SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 423

ANTHONY BARATTA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ANTHONY BARATTA,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony Baratta, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case June 21, 1968.

Opinion Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, is not yet reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered June 21, 1968 (Appendix B hereto, *infra*). The time for filing this petition for certiorari has been extended, by order of Mr. Justice Harlan, to and including August 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Was petitioner unconstitutionally convicted through use at the trial of an undisputedly *Miranda*-banned statement, ostensibly to "refresh recollection" of petitioner testifying on the stand in his own defense; and through use thereafter of Fourth-Amendment-banned evidence, ostensibly for "rebuttal" of petitioner's testimony that his recollection had not been refreshed? Was the procedure in violation of *Walder* v. *United States*, 347 U. S. 62, which sets guidelines for impeachment of a criminal defendant on "collateral" matters when he takes the stand? As part of the constitutional offensiveness here, was there also a violation of the *McNabb* arraignment rule?

2. Were the instructions to the jury prejudicial in practically foreordaining conviction on both the conspiracy and substantive counts through a confusing or merging of the two counts; in failing to charge as to knowledge of illegal importation under the conspiracy count; and in gutting the rule of reasonable doubt by telling the jury they should acquit if they found "that it is more likely that each defendant is innocent than guilty"?

3. In the overall circumstances of this case of severe consecutive sentences (totalling fifteen years on conspiracy and substantive counts), and in view of recent developments in the Federal Courts which have practically elimi-

nated former important differences in the respective modes of proving conspiracy and substantive offenses, should this Court now reconsider the issue of double or multiple punishment under conspiracy and substantive counts?

The following questions are not argued in this petition but are preserved in the event of the granting of certiorari:

4. Was the evidence sufficient for submission to the jury and for conviction?

5. Was the indictment a nullity, jurisdictionally and as a matter of due process, in charging a conspiracy with reference to "narcotic drugs" whose "nature" was "to the Grand Jury unknown"?

6. Was petitioner denied due process and the Fifth Amendment right to indictment by a Grand Jury, by the Government's use before the Grand Jury of the hearsay testimony of a single Federal narcotic agent instead of the testimony of the several indispensable accusing witnesses?

7. Was petitioner convicted in violation of the Jencks Act (18 U.S.C. §3500) in that indispensable investigative notes of the main accusing witness (New York State Detective Bermudez), which allegedly had been turned over to a Federal Agent (Wysor), were claimed by the latter to have been destroyed by him?

Constitutional Provisions and Statutes Involved

The case involves the due process, self-incrimination and Grand Jury indictment provisions of the Fifth Amendment; the Sixth Amendment provision for assistance of counsel; the Fourth Amendment search and seizure provisions; 21 U.S.C. §§173, 174; and 18 U.S.C. §3500. The Title 21 provisions are quoted in Appendix C hereto, *infra*.

Statement of the Case

1. Introductory

Petitioner was convicted, after a jury trial, in the United States District Court for the Southern District of New York (Cooper, D.J.), on narcotic charges. The indictment, which also named other defendants*, contained one conspiracy count and one substantive count (21 U.S.C. §§173, 174). Baratta, being convicted on both counts was sentenced to five years on the conspiracy count (First Count) and ten years on the substantive count (Second Count), to run *consecutively*. Baratta is incarcerated serving his sentence.

2. The Petitioner

The petitioner Anthony Baratta is thirty years old (R. 999). He has no prior convictions. He is a married man, with three young children; his young wife is mentally ill (in an exceedingly grave medical degree). These personal facts concerning Baratta are mentioned here because we, his attorneys, want this Court to know at the outset that our client claims he is an innocent man; nor is this claim on Baratta's part any mere appellate bravado, for he took the stand at this trial and swore to his innocence, indeed he gave to the jury a detailed factual explanation which, if believed, must have exonerated him. See our description of the trial testimony, *infra*, from which it may fairly be concluded, we submit, that the case against Baratta was very weakly proved, but that his self-exculpatory testimony on the stand proved unavailing for the probable reason that the Government made unfair and in fact unconstitutional use of certain extremely dubious evidentiary prod-

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* Tried together with Baratta were defendants named Monastersky, Sancinella and Vega; all were convicted on both counts; defendant Verzino pleaded guilty prior to trial (3a-5a).

ucts of improper search and improper *ex parte* interrogation of Baratta in violation of the *Escobedo-Miranda* rule (again, details as to these contentions are supplied *infra*). We ask this Court to ready its mind for the indications here of miscarriage of justice. In short, at the heart of this petition of Anthony Baratta is the petitioner's theme that the Government's massive anti-narcotics prosecutive enterprises of the present era have in this instance netted an innocent victim.*

3. The Trial Proofs

The Government's proofs, as to both the conspiracy and substantive counts, were concerned with alleged efforts by a New York City police detective named George Bermudez to make a single purchase of heroin, allegedly culminating in a purchase of about one-fourth of a kilogram. These dealings of Bermudez with the alleged sellers extended over a period of about two and one-half months in 1963. Neither the name nor the person of the present petitioner Anthony Baratta entered the picture in any inculpative way under the Government's proofs until the last few hours of the last night of this two and one-half months activity, the Government claiming that Baratta had a part in delivering the one-quarter kilo to the seller who allegedly sold it to Bermudez.

Detective Bermudez testified as to meetings during July 1963, including meetings at the 292 Club, at 292 E. 149th Street, Bronx, with defendants other than Baratta, looking to purchase of heroin (R. 3-19). There was a hiatus until September 21, 1963, when Bermudez apparently moved closer to a heroin purchase from those defendants other than Baratta, the principal figure in such prospec-

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* The unusual length of this petition for certiorari, which we regret, reflects our concern to leave no stone unturned in this presentation.

tive sale being Verzino (R. 19-30). The plan was for Bermudez to park his car in the vicinity of the 292 Club, leave the money ($3900) in the trunk of the car, meet Verzino at the Club and give him the car keys, and get the heroin within an hour thereafter (*ibid.*).

Bermudez next testified as to the night of September 24-25, 1963. He went to the 292 Club that evening about 8:30 P.M. Bermudez caught up to Verzino as the latter was entering the bar. Verzino had just been observed having a conversation with Baratta, who drove off in a black Cadillac after its conclusion. Various of the defendants —Verzino, Monastersky, Sancinella, Vega—moved in and out of the scene. See R. 34-38, 43-47, 258, 486, 562. Bermudez meanwhile had dropped the plan for leaving the money in the car and had it with him (*ibid.*).

About 10 P.M. (September 24), Bermudez saw Baratta enter the bar, whereupon Verzino said "Here's my delivery man now" (R. 42, 47, 50-51). Verzino and Baratta went outside; Bermudez saw a black Cadillac parked nearby, Baratta was sitting in the car and Verzino was standing outside of the car in conversation with Baratta, which Bermudez did not hear; Bermudez started walking back to the bar, Verzino joined him on the street and said to him "It won't be long now" (R. 51-53). But Bermudez had to wait several hours (R. 53-57).

At about 1:45 A.M. Baratta came into the 292 Club; Verzino started yelling and cursing; Baratta and Verzino walked outside, Bermudez followed, he saw Verzino talking to Baratta, as Bermudez approached Verzino said "He's been waiting since 8:30", and Baratta turned to Bermudez and said "I'm sorry, it's my fault (R. 58-59). About 2 A.M. Verzino walked out of the bar, returned about five minutes later, and put a package under Bermudez's jacket (R. 60-61).

On cross-examination Bermudez said that when Verzino said "Here is my delivery man", it was "possible" that the reason was that Bermudez was agitated about the delay and Verzino was trying to soothe Bermudez (R. 127-128).

Bermudez also told the cross-examiner that at no time had he seen anyone hand or otherwise transfer to Baratta the keys to Bermudez's car; nor had Bermudez seen any transaction involving money or heroin or the exchange or passage thereof with respect to Baratta (R. 138-139).

Federal Narcotics Agent Grantland Wysor testified for the Government. On the night of September 24 Wysor was stationed in a surveillance position near the spot where Bermudez had parked his automobile (around East 143rd Street and St. Anns Avenue in the Bronx); about 10:30 or 10:45 P.M. Wysor saw a black Cadillac pull up and park behind Bermudez's car; there were two occupants in the Cadillac; Baratta got out of the Cadillac and walked to Bermudez's Rambler, first going to the door of the driver's side of the Rambler and then the passenger side, and Wysor said he saw the person trying the handle on the passenger side (R. 317-320). Between 1:45 A.M. and 2 A.M. (September 25), Wysor saw Verzino and Baratta in front of the 292 Club; Verzino went back into the Club and Baratta hailed a taxi and left the area (R. 320-321). About 5 minutes later Wysor saw Verzino come out of the 292 Club, walk a short distance away to a gasoline station, where Verzino and Baratta met, and Wysor observed "movement of hands" between them (R. 321-325).

On cross-examination serious doubt was cast on Wysor's testimony of having seen Baratta trying the handle of Bermudez's car. The Agents had evidently made no test for fingerprints on Bermudez's car (R. 413). Nor had

Wysor told the Grand Jury about this alleged incident (R. 437-438). Wysor also admitted that he had not seen Baratta using or trying to use any key on the door of Bermudez's car (R. 422-424). Further as to the above noted alleged "movement of hands" between Verzino and Baratta at the gasoline station, see the cross-examination at R. 469-483.

Agent Norman Matuozzi, on September 24, 1963 around 10 P.M. saw Baratta in the Club vicinity with Verzino; around 10:30 P.M., Matuozzi saw Baratta near an Oldsmobile; Baratta entered the Oldsmobile, there was another individual on the driver's side; in about a minute Baratta and the other individual got out of the Oldsmobile and Baratta had a light colored raincoat over his right arm and he was carrying something in his right hand (R. 489-491).

Baratta took the stand (R. 641 *et seq.*).* He denied all of the charges in the indictment, and ever having been involved in any narcotics activity (R. 642-643). He had known Verzino for 8 or 9 years (R. 643). He had gone to the 292 Club on an occasion in 1963 in an effort to borrow money from Verzino (R. 643-645). Verzino said he might be able to help him in about a week's time, and that they should meet at the 292 Club (R. 645-646). When Baratta did later meet Verzino at the Club and asked to borrow $200, Verzino said that he did not have it at that moment but if Baratta came back a little later he would probably have it; Baratta was embarrassed, as he then had only one dollar left in his pocket, so he asked Verzino for carfare; Verzino told Baratta to use his (Verzino's) car which was parked on the corner and to bring it back when he returned for the money (R. 646-647). Baratta returned to the Club around 1 A.M., he was not

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* Baratta was the only defendant who took the stand.

sure of the time (R. 646-647). Verzino then told him that he did not have the money and that Baratta should wait until the next day; Baratta "got a little annoyed with him because he had me waiting all night," and they "had a few harsh words" (R. 647-648). Baratta then hailed a cab outside the Club and after the cab had gone a short distance Baratta suddenly remembered that he still had Verzino's car keys, and since he had only a dollar he got out of the cab at that place and was walking back to the Club when Verzino came walking towards him; Baratta said to Verzino that he had forgotten the keys, and Verzino said that he knew this and that was why he was looking for Baratta; "And with that I asked him for $5 humbly, and that's the last I've seen of him" (R. 648-649). (The car which Verzino loaned Baratta that night was a 1962 Black convertible Cadillac (R. 649).)

In the cross-examination of Baratta the prosecutor elicited that in 1963 Baratta had an apartment which cost $175 a month with a six month concession, that Baratta was not working, but that his wife was working and that they were being supported by the wife and by Baratta's family relatives (R. 651-653, 659). Baratta also testified that he did not remember seeing Detective Bermudez before this trial, or ever having had a conversation with him in the vicinity of the 292 Club (R. 655-656). He also denied having tried the door handle of the Rambler automobile as testified to by Wysor (R. 665-666).

The prosecutor also questioned Baratta as to certain circumstances in connection with his arrest in this case in the summer of 1964 (R. 672 *et seq.*). The arrest took place in a house in Greenwood Lake, near New York City, where Baratta was then living with his wife and children; he stated that he was living there under his own name and denied that he was using the name Philip Barrone (R. 673-675).

The remaining cross-examination of Baratta, which was largely concerned with his denial that he used the name Philip Barrone, is noted in detail in our "Reasons", *infra*.

* * *

Relevant items in the trial Court's rulings and instructions, and in the opinion of the Court of Appeals affirming the conviction, are treated in our "Reasons", *infra*.

REASONS FOR GRANTING THE WRIT

I. Petitioner Baratta was denied a fair due process trial by the conduct of the Government, allowed by the trial court, which brought to the attention of the jury items which *(by the Government's own express admission)* were banned by *Miranda* v. *Arizona*, 384 U. S. 436, but which were nevertheless insinuated into the trial record on a gross distortion of the theory of "collateral" interrogation of a defendant who takes the stand in his own defense; and which in turn also led to reception in evidence of items obtained by unlawful search and seizure.

In our statement of the case, *supra*, we deferred further description of the cross-examination of Baratta when he took the stand in this trial, and of the Government's rebuttal evidence. These facts will be summarized in this "Reason" I, after the following preliminary synopsis of the theory of our contentions in this "Reason" I.

As seen, in Baratta's own direct testimony (R. 641-650) he denied the indictment charges, denied ever having been involved in any narcotics activities, and admitted knowing Verzino and having tried to borrow money from him in the late sumer of 1963 (with circumstances which could well serve to explain exculpatively the Government's

proofs concerning Baratta's activities on the night of September 24-25, 1963). Baratta's direct examination did not touch at all on anything relating to his arrest in this case, or to any possible fugitivity by him or other concealment of his whereabouts or of his identity at any time. Nor had the Government in its case in chief seen fit to introduce any proof of any alleged fugitivity or concealment of identity by Baratta either in connection with this case or at any other time.

However, in the cross-examination of Baratta the prosecutor—still not importing by express words any idea of alleged fugitivity—focussed intensively on Baratta's alleged use of the alias "Phillip Barrone" at the time of Baratta's arrest in this case. And, as will be noted in detail, *infra*, the prosecutor, with permission of the trial Court, and over repeated defense objection, contrived to bring to the attention of the jury a mass of material banned (admittedly) by the *Miranda* case and banned also on grounds of unconstitutional search and seizure. All of this was done by the prosecutor, with the Court's permission, through the device of invoking the theory of "collateral" cross-examination of a defendant who takes the stand (the authorities are discussed *infra*). But we contend that what actually occurred here, in realistic constitutional terms, was that in violation of both *Miranda* (self-incrimination and assistance of counsel) and the Fourth Amendment (search and seizure), the prosecutor was permitted not merely to make "collateral" attack on Baratta as to "credibility", but he was permitted in effect to impugn by unconstitutional methods a vital part of the defense on the question of guilt or innocence as such, through getting across to the jury that Baratta must be guilty not because his explanatory defense (as to borrowing money from Verzino) was not "credible" but because Baratta in allegedly using the name "Phillip Barrone"

both prior to and at the time of his arrest (nearly a year after the alleged offense) had manifested that he was a fugitive from justice. Again we note that the Government did not see fit to allege fugitivity openly or directly to the jury; and it is our contention that one quite probable reason why the Government did not do so is—aside from the constitutional inadmissibility of the proofs (*Miranda* and Fourth Amendment) and aside also from the Government's apparent judgment that it could not make such proof stick on the merits of the issue of fugitivity—that the Government well knew the fugitivity element, being an integral part of proof of guilt as such in a criminal case where fugitivity is alleged, could not constitutionally be brought to the jury's attention through merely "collateral" cross-examination of the defendant for the sole ostensible purpose of "credibility", wherefore, the Government instead chose to get these forbidden fugitivity proofs into the record by a back door.

Finally, before going into the factual details which pertain to the foregoing, it must be mentioned that the record in this case contains indications of exceedingly questionable if not suspicious circumstances as to the obtaining of an alleged arrest warrant *re* Baratta *after the arrest had already been made without a warrant,* and that the prosecution was indicatedly aware of these circumstances but did not bring them to the attention of the trial Judge or the pre-trial Judge, both of which Judges were called upon to rule upon motions to suppress evidence seized in a search at the time of the arrest; as will appear, these questionable or suspicious circumstances were not reasonably discoverable sooner by Baratta's trial or appeal counsel.

We turn now to the more detailed description of the trial record facts pertaining to this "Reason" I.

It will be recalled that the alleged sale of heroin to Detective Bermudez occurred on September 2[redacted] 1963. The

indictment in this case was filed December 31, 1964. According to the testimony of the arresting officer, Agent David W. Martowski, Baratta was arrested at Greenwood Lake during the afternoon of July *11th*, 1964 (R. 695-696).*

This date is important because it is undisputed *now*—but has apparently not *always* been conceded by at least some of the Government's officers in this case—that the arresting officers did not have an arrest warrant on July 11th, 1964; it has never been claimed that they had a search warrant. Thus, at R. 702 the prosecutor told the trial Judge, referring to Agent Martowski, that "at the time of the arrest I believe he was not armed with an arrest warrant or a search warrant"; but the record shows that, at significant times prior to the latter concession at the trial, the Government or some of its representatives evidently were preparing to take a different position on this issue of the existence of a warrant or warrants on July 11, 1964, and that they were prepared to do so in a manner justifying suspicion of improper conduct by the Government. For, the record reveals that on *July 13*, 1964, *two days after the arrest*, a Federal Narcotics Agent swore out a complaint for an arrest warrant for Baratta; and, also interesting, the docket entries in this case reveal that the United States Commissioner's temporary commitment of Baratta as well as the arrest complaint are "both dated 7-13-64" (and see R. 1018-1022). In other words, the record reveals, or at least strongly suggests, that the Federal Narcotics Agents in this case apparently tried to obscure the chronology of the Baratta arrest by making it appear that the arrest was made not on July 11 but on

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* For reasons which will appear, this date of *July 11th*, is crucial to the issues of unlawful search and seizure. There is no possibility whatever of any doubt that the arrest did occur July 11th, and the Court below has so concluded (Appendix hereto, *infra*, p. 10a, fn.). See R. 696-697, 725.

July 13, 1964 and that it was made with the benefit of an arrest warrant. To the honorable credit of the prosecutor in this trial, this indicated obscurement (if not concealment) of the true facts by the Narcotics Agents was not carried forward when the issue came to attention in the present trial; as above noted, the prosecutor acknowledged to the trial Judge that there had been no arrest warrant and no search warrant (R. 702), and his presentation of the testimony of Agent Martowski was directed to July 11, rather than July 13, 1964 as being the actual date of the arrest (R. 696-697). However, the prosecutor in this trial, while thus refraining from any complicity in the indicated anterior improprieties as to the chronology of the arrest and the strange "arrest complaint" of subsequent date, did not, we respectfully contend, fulfill his complete duty of disclosure and presentation on the issue of the legality of the arrest and search. A full disclosure and presentation on that subject would have included the following:

The indictment having been filed December 31, 1964 (*supra*), and Baratta having pleaded not guilty on January 12, 1965, a motion was made on Baratta's behalf on February 15, 1965 by Herman Edelman, Esq.—who represented Baratta at the instant trial and who had been engaged by Baratta shortly after the arrest of July 11, 1964—for return of property seized at the time of the arrest and to suppress evidence (R. 980-983). That motion averred that an arrest complaint had been executed and filed on July *13*, 1964, that the Agents had arrested Baratta on or about *July 13*, that there had been no search warrant, and that no indictment was pending at the time of the arrest and search. The motion papers also averred that Baratta had not been brought before a United States Commissioner in the District in which he was arrested and that no hearing had been held directing his removal to the Southern District of New York pursuant to Rule 40(a)

F. R. Cr. P.; the motion prayed for return of the property and suppression of evidence on the ground of the claimed violation of Rule 40(a), or in the alternative for a hearing (R. 980-983). It is evident from the foregoing that Baratta's attorney, Mr. Edelman, was unaware at the time of said motion that the arrest and search had occurred on July 11, 1963, and that he thought such had occurred on July 13, 1964; and from the record entries previously mentioned—the date of July 13 on the arrest complaint and on the Commissioner's order of temporary commitment—this erroneous impression of Baratta's attorney was understandable. It is also evident that, since Baratta's attorney on the aforesaid motion thought Baratta had been arrested July 13, and since the file showed an arrest complaint sworn to July 13, Baratta's attorney naturally thought the arrest had been based on a warrant issued on such complaint of July 13. From which it is further understandable that the above mentioned motion of February 1965 raised no issue as to the validity of the arrest except the issue as to venue of the arraignment before a United States Commissioner.

Incidentally, as to the puzzle of whether Baratta was placed under *committed* detention on July 11 (the indisputable date of the arrest) or on July 13 (the date stated in the official file), the following further interesting points arise: If he was committed on July 11 without being arraigned before a United States Commissioner until July 13, the problem of improper delayed arraignment under *McNabb* v. *United States,* 319 U. S. 332 arises; and this problem is more than academic in the present case because, as will be noted *infra,* Baratta was interviewed by the United States Attorney's Office after his arrest, in admitted violation of the *Miranda* rule, and indicatively (*infra*) this would have occurred during the *"McNabb"* period; as also noted *infra,* the written question-and-answer paper of this

interview was used in this trial under circumstances short of introduction thereof in evidence but in a manner plainly involving violation of Baratta's constitutional rights—all of which, again, is more fully discussed *infra*. In other words, on the present record, the conclusions are inescapable that (1) Baratta was not brought before a United States Commissioner until July 13, 1964 (two days after his arrest); (2) that this vital *"McNabb"* fact was apparently deliberately obscured through the filing of a July 13 "arrest complaint" when the actual arrest had taken place two days earlier; and (3) that the United States Attorney's Office unconstitutionally interviewed Baratta between 11 and July 13, *i.e.*, at a time when Baratta's *"McNabb"* detention was supported by no demonstratedly proper arrest process, all in violation, moreover, of the *Miranda* requirement of assistance of counsel, etc.

The aforementioned motion of February 1965 for return of property and suppression evidence was replied to by an "affidavit in opposition" of an Asssitant United States Attorney (June 1965) stating only as follows (R. 990-1000):

> "4. The defendant further contends that certain property seized at the time of his arrest at Greenwood Lake, New Jersey, should be suppressed on the grounds that he was not taken before the nearest available United States Commissioner for arraignment. No authority is cited for this contention. The arrest of the defendant was lawful and the property seized as a proper incident thereto. The place of arraignment is immaterial."

Thus, the Assistant United States Attorney who made the above quoted averment contented himself, as regards the issues here under discussion, with the *conclusory* assertion that "the arrest of the defendant was lawful and the property seized as a proper incident thereto."

In September, 1965, District Judge Cannella denied Baratta's motion for return of property and suppression of evidence with the following memorandum (R. 980-983):

> "Motion pursuant to Rule 41(e) and Rule 40(a), Federal Rules of Criminal Procedure to suppress evidence is denied.
>
> The defendant was arrested on *July 13, 1964* at Greenwood Lake, New Jersey *upon the basis of a complaint charging a violation of T 21 U.S.C. §§173 & 174, properly filed with the U. S. Commissioner, S. D. N. Y.* He was searched at the time of the arrest and property (not further described) was seized from his person.
>
> The defendant claims that since he was not taken to the nearest available U. S. Commissioner for arraignment, the articles seized at the time of the arrest should be suppressed. His contention is not based on any precedent and is without merit. The contention is a complete non sequitur. *Since there is no dispute that the arrest was lawful,* the fruits of a search made at the time of arrest are not suppressible.
>
> So ordered." (Italics added.)

From the facts heretofore presented, we may now see that Judge Cannella's above quoted opinion was based on factual misapprehensions evidently grounded upon the official files or records (and, seemingly, on the Government's failure to make more full and frank presentation in the motion proceeding before Judge Cannella). The factual misapprehensions to which we refer are denoted in the italicized items in the above quotation from Judge Cannella's memorandum opinion: (1) Judge Cannella was factually incorrect in stating that Baratta was arrested "on

July 13, 1964", and that this arrest was "upon the basis of a complaint * * * properly filed with U. S. Commissioner * * *"; (2) Judge Cannella was *ultimately* incorrect—although technically correct at the time—in stating that "there is no dispute that the arrest was lawful * * *"; obviously, if Baratta's counsel had known of the facts above recited there would have been plenty of "dispute" indeed as to the lawfulness of the arrest (and of the incidental search).

With the above background facts in mind concerning the arrest and search of July 11, 1964, we may now turn to the trial proceedings herein, for additional details as to the arrest, the search, and the ways in which the circumstances of the arrest and the search were utilized by the Government (with the trial Court's permission) to trample the rights of Baratta in violation of *Miranda* and of the Fourth Amendment.

As above mentioned, the description in our statement of the case, *supra,* of the prosecutor's cross examination of Baratta paused at the point where the prosecutor commenced inquiring about Baratta's alleged use of the name Phillip Barrone; more particularly, this questioning related to the time of Baratta's arrest in this case (R. 672-675). It now becomes important to note the exact form of Baratta's response to these questions about use of the alias, because shortly thereafter in the trial the Court was to make a vital ruling based on the idea that Baratta had answered these questions uncertainly and therefore needed his "recollection refreshed". See Baratta's cross examination at R. 675, where he answered repeatedly and positively, when asked under what name he had been living in Greenwood Lake, that he had been living there under his name Anthony Baratta, that the name Phillip Barrone did not ring a bell with him at all, that he was not living there under the name of Phillip Barrone, and that he had no

doubts about his having lived there under the name Anthony Baratta.

With this last mentioned response of Baratta, that "no, I don't have any doubts about it" (R. 675), the prosecutor immediately set about execution of the strategy, obviously well planned in advance, for circumventing *Miranda* and the Fourth Amendment. This initial step by the prosecutor was the marking of a document which he flourished in Court, as Government's exhibit 6 for identification, and then the prosecutor turned to Baratta on the witness stand and said "I would like to show you something" (R. 675). Defense counsel immediately requested a conference outside the presence of the jury and such was held (R. 676-680). In that conference it emerged that exhibit 6 for identification was a written question and answer statement which an Assistant United States Attorney had taken from Baratta immediately or shortly after the arrest of July 11, 1964 (R. 676) or "on the day of his arrest" (R. 677); to this moment we (Baratta's attorneys) have not seen that statement, we do not know its date, the name of the Assistant or the contents in any detail.*

It also emerged, upon inquiry by defense counsel, that the statement (we quote the prosecutor, Mr. Bartels at R. 676-677), "was taken in violation of the *Miranda* decision". However, the prosecutor continued (R. 676-677), it was the Government's position that under the *Walder*, *Curry* and

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* It is by no means clear that Baratta's trial counsel is chargeable with failure to exercise any opportunity or right in not having requested production of the written statement, as we had no sure knowledge of its existence, and when the prosecutor had it marked at the trial as aforesaid the immediately subsequent proceedings *in camera* which we are above describing did not entail our examining the statement, as will appear. But even if Baratta's trial counsel is at fault, the issue is too fundamental to be foreclosed now.

Mullings decisions (cited and discussed *infra*) the Government was entitled to use the statement as a basis for asking Baratta whether he had said on the day of his arrest that he was using the name Philip Barrone; the Government's theory being that its questioning of Baratta on this point "is collateral and does not go to his right to deny the elements of this crime. He has come forth and said he did not ever use the name Phillip Barrone. This is a side issue.** It goes to credibility. * * * On collateral issues a defendant does not have the right to take the stand and deny collateral issues and then escape with it because he [has] given a statement without the proper *Miranda* rules" (R. 676-677).** The trial Court, after discussion off the record, described that discussion for the record and stated that "the law is in a state of uncertainty throughout the nation on this score but that the Judge would make a ruling if Mr. Bartels felt that the question that he has now put was imperative from the point of view of the Government's interest, Mr. Bartels wound up by saying that he would be content to show the witness * * * a statement and ask him whether or not reading a certain portion of that statement refreshes his recollection as to whether at Greenwood Lake he used a name other than Baratta. That is the extent to which Mr. Bartels expects to go on this point, and if the witness says no, it does not refresh his recollection, Mr. Bartels feels that he will then abandon this particular point." (R. 677-678).

To the objection of Baratta's trial attorney that this proposed procedure would be prejudicial as involving "a loaded question" and an improper device to "refresh" rec-

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** As we show *infra*, one fatal vice in the above quoted theory of the Government was that Baratta had not "come forth" in his own direct testimony to deny that he had used the alias, and that this was first introduced into the picture by the Government on Baratta's cross examination; in *Walder* (*infra*) this Court condemned this very tactic.

ollection, the Court soothingly replied that there "would be nothing before the jury that would show what the statement is" and that "on the basis of the testimony given by the witness and his demeanor and the way he responded to this particular point it is quite clear that there is a certain element of uncertainty. I wouldn't say that his responses are that positive" (R. 678-679).* Baratta's counsel, after the further colloquy described in the last preceding footnote, stated that "I'm going to preserve my objection, of course, to all of this and object to * * * [a]ny exhibition of the item at all"; the objection was overruled (R. 679-680).

Being thus unleashed by the Court, the prosecutor then went on to ask Baratta, "I show you what has been marked Government's Exhibit 6 for identification** and ask you if that refreshes your recollection as to whether you ever

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* That the Court was plainly incorrect in thus characterizing Baratta's testimony as to use of the Phillip Barrone alias is shown by the testimony at R. 674-675 previously described where Baratta denied unequovically that he had used the alias. To the last quoted statement of the Court in the text above, Baratta's trial counsel unfortunately responded "I agree with you" (R. 679). But Mr. Edelman, along with the Court, was mistaken in any such evaluation of Baratta's testimony at R. 674-675 (as supposedly having lacked positiveness or certainty), and we take it that a merely complaisant evaluational observation of this kind by counsel which is demonstratably incorrect in point of fact, cannot "bind" the defendant; all that can "bind" in such a situation is the actual record itself. Unfortunately also the trial Court picked up Mr. Edelman's incorrect remark and went on to say, with alacrity, "Since you agree" the prosecutor would have the right to go on and "refrsh" Baratta's "recollection", the Court concluding with the further soothing remark, "that is all there is to it" (R. 679).

** This Exhibit was the alleged statement taken from Baratta by an Assistant United States Attorney around the time of his arrest.

used the name Philip Barrone", to which Baratta replied "not to my recollection" (R. 681).

According to the solemn (and soothing) assurances of the prosecutor and the Court *supra* that the matter would be dropped thenceforth if only the Government were allowed to ask Baratta a question along the lines just quoted and if Baratta were to answer in the negative (as he did), the foregoing should have ended this direction of inquiry in the Baratta cross-examination, *i.e.*, inquiry as to whether he ever used the name Phillip Barrone. But such did not prove to be the end of the matter by any means.

Instead, the prosecutor now—evidently emboldened by the prosperous auspices of his tactics thus far and by the trial Court's *laissez-faire* (if not positively encouraging) attitude—went on to confront Baratta with a series of "exhibits for identification" which, as was shortly to become apparent (*infra*), had been seized in Baratta's home at Greenwood Lake at the time of his arrest; as we shall show, these exhibit items had been seized unconstitutionally; so that, this next tactical turn by the prosecutor, in confronting Baratta with the unconstitutionally seized exhibits, involved both (1) a betrayal by the prosecutor of his promise (*supra*) to drop the "Philip Barrone" avenue once the single question and answer above noted had been had, and (2) an inexcusable endeavor by the prosecutor to utilize not only the *Miranda*-banned "statement" (*supra*) but in addition the Fourth Amendment-banned items of the arrest-search.

The first of these search items which the prosecutor now proceeded to use for the express purpose of further exploring the Philip Barrone avenue which supposedly had been terminated under the promises and assurances above mentioned, was insinuated into the record in the following manner: The prosecutor asked Baratta whether while at Greenwood Lake he had ordered a Chris-Craft boat,

which Baratta denied; thereupon the prosecutor showed Baratta Government's "exhibit 7 for identification", and Baratta stated that the exhibit did not refresh his recollection (R. 681-682, 684).*

Next the prosecutor asked Baratta whether, when he was arrested at Greenwood Lake, there was a red Thunderbird car "on the property", to which Baratta replied "yes", and whether the agents had found money in that car, to which Baratta replied that he believed they did, but he could not recall the amount or whether it was more than $1,000 or more than $5,000 (R. 684-685).

The prosecutor then asked Baratta if he had purchased "on June 3, 1964 * * * a 1964 Buick with Wonderbar Radio, power seat [*sic*], air conditioning, remote control", and when Baratta said he had no recollection of such a purchase, the prosecutor showed him Government's "Exhibit 8 for Identification", asking Baratta if he could identify it, whether he had ever seen it before, and whether

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* When the prosecutor showed Baratta exhibit 7 for identification, defense counsel at once objected "on the ground that in the Robing Room the parties agreed to certain facts and I would like to know the purpose of this exhibit" (R. 682)—defense counsel was here referring to the colloquy at R. 676-680, previously described, in which the prosecutor and the Court had assured the Baratta defense that if only the Government were allowed to ask one question about "Phillip Barrone" based on the Miranda-banned quesion-and-answer statement, that would be the end of the matter. But the trial Court, displaying what we contend was unjustified and indeed prejudicial *animus* towards defense counsel (in the presence of the jury), now not only rejected defense counsel's mild remonstration about the understanding which had been reached in th Robing Room, but took occasion to excoriate and demean defense counsel (still in the presence of the jury); space limitations prevent our quoting this extraordinary outburst of the trial Court (see from just below the middle of R. 682 to the end of R. 683).

he had it in his possession or in the house at Greenwood Lake in July 1964 (R. 685-686). (Again, we see here the prosecutor's scheme, obviously well-worked-out-in-advance, for conveying to the jury the detailed contents of constitutionally inadmissible documents which, as will appear, had been allegdly seized from Baratta at the time of his arrest; note in the item just described the artful method of the zealous young prosecutor, *viz.*, how, immediately before flourshing the document "for identification", he recites with utmost factual particularity the specifications of the suggestibly luxurious and expensive Buick supposedly referred to in the document.

And so the prosecutor went on, in his cross examination of Baratta, confronting Baratta with additional (search-obtained) exhibits for identification numbers 9 to 13 inclusive, all of which Baratta denied having seen before or that the items had been in the house at Greenwood Lake in July 1964, except as to two items pertaining to a bank account of his wife (R. 686-689).

Having thus "laid a foundation" for "contradicting" Baratta's denials concerning these various documentary items and their supposed "Philip Baronne" indicia, the Government then called a "rebuttal" witness, David W. Martowski, a narcotic agent who had participated in the arrest of Baratta at Greenwood Lake on July 11, 1964 (R. 694 *et seq.*). Martowski testified that he arrested Baratta in a bedroom of his house, Baratta being in his underwear at the time (R. 697).* Martowski searched that room, and

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* The prosecutor here obviously was setting the scene in such a manner as to ensure the jury would unmistakably understand that the previously mentioned exhibits "for identification" ought to be connected in an immediate personal way with Baratta because

(*Footnote continued on following page*)

he took some papers from it (R. 697-698). At this, a side bar conference was requested and granted to discuss defense objections to the constitutionality of the search (R. 698 *et seq.*). The proceedings at this sidebar conference being deemed by us crucial for the issues herein, we invite attention to the following details:

At the outset of the sidebar conference attention was again called to the pretrial defense motion to suppress evidence, *supra* (R. 698-699). Baratta's attorney, Mr. Edelman, urged that the prosecutor was attempting, by a combination of using the products of an unconstitutional search and of ostensibly using "rebuttal" to attack "credibility", to bring in the constitutionally forbidden "extrinsic evidence" obtained in the invalid search (R. 699-700). The prosecutor argued that the search had not been rendered illegal by the lack of a warrant because "• • • the law is clear. An indictment having been brought down, there is probable cause. The motion is being made now after an indictment was brought down. There was probable cause to arrest this man and the testimony of the witness [Martowski] will be that he was arrested in the bedroom and that these articles were found in the bedroom" (R. 700).

(*Footnote continued from preceding page*)

those documents were found and seized right in Baratta's own bedroom, etc. The prosecutor was leaving nothing to chance in these deliberate step-by-step efforts to get before the jury these unconstitutional "proofs". It is impossible to avoid the conclusion that the prosecutor quite deliberately wanted the jury to conclude that those tendentious exhibits had belonged to Baratta and must be taken as branding Baratta with the alias identity which the prosecutor was striving to insinuate into the record (the "Phillip Barrone" alias). In every way the prosecutor was endeavoring to utilize, before the jury, the products of the unconstitutional search, by means which although ostensibly operating within a constitutional framework of "impeachment of credibility" were in fact arrantly unconstitutional and destructively prejudicial.

We pause to comment on the breathtaking fallaciousness of the prosecutor's argument just quoted. Since when, in the law of the Fourth Amendment, have a warrantless arrest and a warrantless search "incident" to such arrest which were not otherwise even claimedly valid at the time when they were done, been rendered *subsequently and retrospectively* valid by the handing down of an indictment? One rubs one's eyes, even more than at the startlingly obvious error of this argument of the prosecutor, at the failure of the learned trial Judge to detect the fallacy.*

The prosecutor's next argument—in the aforementioned side bar conference at R. 698 *et seq.*—was that Agent Martowski's testimony "goes to the very heart of [Baratta's] credibility. Here is a man who testified under oath that he did not have anything to do with this narcotic transaction, that he was unemployed, had no funds to speak of, and that he never used the name Philip Barone. When given the opportunity to refresh his recollection he denied it. What could be more informative and crucial for the Jury in making a determination on the issue of credibility [than] this testimony as to the documents found in his bedroom at the time of his arrest?" (R. 700-701).**

The prosecutor then added that Baratta and his attorney "had all the information which is now being brought out two years ago", and, specifically, that they knew about the money which was taken by the Agents at the time of the arrest (R. 701).***

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* Not until the appeal in the Court below did the Government shift to an outright contention that the warrantless arrest was on "probable cause" . . . an issue never litigated in the pretrial or trial stages. See further as to this *infra*.

** This argument of the prosecutor is further discussed *infra*.

*** See the last preceding footnote.

The prosecutor then invoked the authority of Judge Cannella's pre-trial denial of the motion to suppress (R. 701-702), which we have discussed previously.

The prosecutor then argued the theme that "now that the defendant Baratta has taken the stand, has given unequivocal testimony, has stated he has never seen any of these documents before in his life, the testimony of this arresting person * * * is vital and goes to the very heart of this defendant's testimony" (R. 702).*

The Court then asked the prosecutor what process Agent Martowski had at the time of the arrest, the prosecutor replied that Martowski had neither an arrest warrant nor a search warrant, and the prosecutor went on to reiterate his prior contentions, saying, "* * * however * * * that is not material to your honor's decision because an indictment has come down. There is a determination of probable cause. The testimony will be that the search was within the bedroom,** and I further urge upon your Honor that Mr. Edelman and Mr. Baratta had knowledge of all these facts and were obliged under 41(e) to make that attack during the two and a half years between the date of arrest and the date of this trial * * *" (R. 702-703).

(We take up *infra* the astounding series of legal fallacies in the above argumentation of the prosecutor, *i.e.*, the fallacies in addition to the one already noted as to the supposed validation of the arrest-incident search by the subsequent handing down of the indictment.)

Upon completion of the above side bar argument of the prosecutor, the Court (still side bar) read into the record Judge Cannella's pre-trial decision denying the motion to suppress (*supra*) (R. 703-704).

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* See the next-to-last preceding footnote.

** Surely the search of the Thunderbird car containing money was not "within the bedroom" (R. 710-711).

Baratta's attorney then replied (still side bar) that we had never previously been able to find out what property had been seized, and that we had therefore been unable to make previously the motion which was now before the trial Court (R. 704-705). (Baratta's attorney did not add, because he was not then alert to the intricacies of the Government's strategy, that his own pretrial motion papers and Judge Cannella's pre-trial decision had both proceeded on the erroneous assumption, *derived from the official file* (as explained *supra*), that the arrest had been made on July 13, 1964 and on a warrant issued that day, when in fact the arrest had been made on July 11, 1964 and without any warrant. The failure of Baratta's attorney to recall, during the stress of the side bar conference here being described, that his pre-trial motion papers and Judge Cannella's opinion had been based on this erroneous assumption as to which now for the first time the prosecutor had revealed the true facts, should not preclude our raising on review the issue of the constitutionality of the search and of the use made of the search products in this trial, for the point is fundamental and, we contend, constitutionally fatal to the judgment below.*

After a further side bar argument by the prosecutor that the defendant previously had opportunity to move

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* Mr. Edelman also told the Court, at the above juncture in the side bar conference, that he did not at that moment have his original pretrial moving papers with him, and that he would look at them in the file lates that afternoon (R. 704-705). Unfortunately Mr. Edelman did not detect the purport of the situation until this case had reached the appeal stage. But, again, we respectfully urge that we should not be precluded as to this fatal constitutional defect in the search procedure and the Government's treatment of the situation as above described.

for return of property seized, etc., the trial Court said (still side bar) (R. 705-706):

> "My initial reaction was to insist on further proof with respect to the arrest, but in the light of the indictment, in the light of the reasoning of Judge Cannella, I am inclined and do overrule the objection and will allow the witness to proceed to testify along the lines indicated."

Mr. Edelman then renewad his motion to suppress the evidence, which was denied (side bar) (R. 706). And thereupon, before the jury, the prosecutor went forward with the testimony of Agent Martowski, whereby there became introduced into evidence all of the seized items (*infra*).

Before taking up this further testimony and introduction of the products of Martowski's search, let us examine more closely the legal and constitutional incidents of the strange side bar happenings above described.

It will be recalled that that side bar conference was occasioned by the Government's having put agent Martowski on the stand to testify about the search and its products, Mr. Edelman then objecting that this was an improper attempt to use "rebuttal" for attack on the defendant's "credibility" with the aid of unconstitutionally seized evidence. It will also be recalled that the prosecutor, in reply to these defense objections, began by defending the legality of the search, despite the lack of an arrest warrant or a search warrant, on the preposterous ground that an indictment had subsequently been handed down. We have previously commented concerning this unique theory of the Fourth Amendment. We may now add that the prosecutor's simplistic (to put it mildly) argument that a subsequent indictment can thus retrospectively cure

an invalid search apparently appealed to the mind of the learned trial Judge for the probable reason that the Judge was thinking of the well known rule that an invalid *arrest* made *pre-indictment* may become an academic issue once an indictment is handed down; but of course, the rule is otherwise if what the prosecution seeks to establish in connection with the pre-indictment invalid arrest is the validity of a *search* that was made incident to that arrest and without a search warrant. In suggesting that in the ignoring of this fundamental Fourth Amendment distinction is to be found the probable explanation of Judge Cooper's surprising failure to detect instantly the fallacy of the Government's argument, we are not merely trying to engage in a polite exercise of speculation about the mental processes of the learned Judge; rather, we are trying to bring into sharper focus exactly what the fallacy was and how unpardonable, really, was the Government's resort to this fallacious formulation. It is hardly necessary to cite authority for the point that a search which is unconstitutional under the Fourth Amendment is not made valid by what the search turns up or, *a fortiori*, by the use of the unconstitutional search product to obtain an indictment. *E.g., Giordenello* v. *United States*, 357 U. S. 480.

What of the prosecutor's above described further contentions as to the validity of the search and seizure? As seen, the prosecutor went on to spin out for Judge Cooper's instruction such ideas as that the defendant had slept on his rights in regard to pretrial challenge of the search, and that Judge Cannella had resolved the issue against the defendant by a pretrial decision denying a motion to suppress. These arguments of the prosecutor are sufficently answered in what we have previously said, but it

is worth devoting a little more attention to the arguments.*

The argument that we slept on our rights fails factually because we did make, pre-trial, the only motion which was then open to us on the facts reasonably apprehendible from the official files of the case, which, on the Government's own record entries in that file, erroneously made it appear that Baratta had been arrested on *an arrest warrant issued July 13, 1964*—so that it erroneously appeared the search was incident to a lawful arrest. For the Government to have imported the egregious error into these records, as apparently someone of the Government's staff did, was bad enough. But for the Government then to stride self-righteously forward in this trial and reproach us for having failed to make a proper motion to suppress evidence pre-trial, can be characterized only in the vocabulary of expletives. Likewise the Government lacked factual justification for its alternative contention that we were given a constitutionally adequate judicial determination, pretrial, on the motion to suppress which we did make (before Judge Cannella). We shall not repeat here our detailed demonstration *supra*, that Judge Cannella was as misled as we were by the Government's anterior incorrect representation that it had arrested and searched Baratta on the basis of an arrest warrant and the execution thereof on July 13, 1964.

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* As mentioned in a previous footnote, the Government ultimately (not until the appeal) took the position that the agents contemporaneously had "probable cause" to arrest; and the Court of Appeals not only swallowed this afterthought contention of the Government—as to which literally no record showing of such claimed facts of "probable cause" has ever been made herein—but that Court went on to rule that this belated contention was dispositive in the Government's favor on the entire complex of the *Miranda*—Fourth Amendment issues in this case (*infra*).

We next consider the reasons stated by Judge Cooper for his ruling that the search products were admissible, the ensuing testimony of Agent Martowski which put those search products into evidence, and the legal and constitutional merits of the question of whether the use of such search products in the present case satisfied the requirements of the *Walder* decision of this Court *infra*) under the doctrine of credibility-impeachment of a defendant who takes the stand in a criminal case.

First, as to Judge Cooper's decision, this appears at R. 705-706 (quoted at p. 29, *supra*). Judge Cooper's ruling was based (1) on acceptance of the prosecutor's fantastic theory that a subsequent indictment retrospectively creates "probable cause" for an anterior search not otherwise shown to have been valid under the Fourth Amendment; and (2) on Judge Cannella's pre-trial memorandum, which indisputably had been based on the factually erroneous assumption that the search had been incident to an arrest based on a validly issued arrest warrant.

Second, as to Martowski's testimony which resulted in the reception in evidence of all of the products of the search, it is unnecessary to burden this petition with a detailed description of that testimony, which appears at R. 708-717 (direct examination), R. 717-735 (cross-examination). Suffice it to say that through this testimony the Government succeeded in spreading before the jury a mass of documents allegedly found in Baratta's bedroom from which the jury were asked by the Government to infer that Baratta had been using the alias Philip Barone during his stay at Greenwood Lake—plus the testimony about the money found in the Thunderbird car. Since Baratta's alleged narcotics activities charged in this indictment occurred on September 24-25, 1963 in New York City, and since the arrest occurred at Greenwood Lake

on July 11, 1964, and since also the Government had contrived (as seen) to have the jury infer that Baratta was using an alias at that time, it is manifest that what the Government had ultimately succeeded in doing through all of its above described machinations was to insinuate quite effectively to the jury that Baratta allegedly had been in a status of fugitivity because he was found living in a country place and allegedly using an alias.

Third, then, bearing in mind this circumstance that the Government's ostensible purpose in using the search products for "crediblity impeachment" must be evaluated in the light of the actual results consisting of an outright imputation of fugitivity, the situation may be analyzed along the following further lines: As noted at the outset of this "Reason" I, when Baratta took the stand and testified on direct examination he was not asked nor did he say anything about use of an alias or fugitivity; his direct examination dealt only with his denial of the indictment charges, his denial of ever having been involved in narcotic activities, and his admission of having tried to borrow money from Verzino; the direct examination did not touch on anything relating to his arrest or, we repeat, on any possible fugitivity or other concealment of his whereabouts or his identity at any time. See pp. 9-10, *supra.* Nor, as seen, had the Government in its case in chief seen fit to introduce any proof of any alleged fugitivity or concealment of identity by Baratta in connection with this case or at any other time (pp. 3-10, *supra*).

The entire "Philip Barrone" theme with its imputation of fugitivity, then, was brought into this trial record for the first time through the Government's cross-examination of Baratta and its tricky "rebuttal" tactics (Martowski), in both of which endeavors the Government played

to the hilt the products of what may now unmistakably be seen to have been an unconstitutional search.*

The controlling case for testing the overall constitutionality of these trial tactics of the Government is *Walder* v. *United States*, 347 U. S. 62 (1954)—with which see also the decisions of the Court below in the *Curry, Mullings, Armetta* and *Vanterpool* cases, and decisions of other Circuits in the *Lee, White, Hill* and *Blair* cases, all cited and discussed *infra*. The operative facts in *Walder* were that the defendant had defeated an earlier Federal narcotics prosecution on the ground of unconstitutional search and seizure; in a subsequent Federal narcotics prosecution (the one which was under review in *Walder*) the same defendant took the stand and in his *direct testimony* had not only denied his guilt of the charges but had gone further and volunteered that he had never been engaged in narcotics activities at all; the Government in the *Walder* prosecution then confronted him with proof of the products of the unconstitutional search in the prior prosecution; and this Court in *Walder* held that this was proper because a defendant cannot constitutionally demand the right of shielding himself behind the ban against an unconstitutional search when such defendant voluntarily puts in issue the truthfulness of what was disclosed by that search by taking the stand and in his direct examination making a gratuituous denial to the contrary which is demonstrably perjurious and involves a topic "collateral" to the ultimate issue of his guilt or innocence. The Court in *Walder* expressly distinguished, however, as being con-

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* We note *infra* the specious argument of the Government in the Court of Appeals (adopted by that Court) that the Government's entire tactics of "impeachment" and "rebuttal" were justified by Baratta's testimony of trying to borrow money from Verzino.

stitutionally forbidden, the situation in which the Government tries to "smuggle in" the "tainted evidence" on cross examination when it could not do so in its case in chief, citing *Agnello* v. *United States*, 269 U. S. 20 (see the *Walder* decision at 347 U. S. p. 66); or the situation in which the cross-examination or rebuttal tactics of the Government are aimed at utilizing unconstitutionally obtained evidence where such would deny "a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief" (*id.*, at p. 65).

Thus, *Walder* preserves* intact the constitutional right of a defendant in two respects which, we contend, are decisively pertinent here: (1) The defendant who takes the stand cannot be cross-examined or "rebutted", by resort to "tainted evidence", as to any subject which he did not himself put in issue in his own direct testimony, and this restriction applies (*Walder* we think indicates) even as to "collateral" items of "credibility impeachment" which have not been opened up by the defendant's direct testimony—in the present case of Baratta the Government used the cross-examination and rebuttal to import or insinuate into the record both the admittedly *Miranda*-banned alleged statement of Baratta and the indisputably Fourth Amendment-banned search products, and the Government used both of these to rebut and discredit Baratta on a subject not touched upon in Baratta's direct

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* Shepard's Citator does not reveal any later case in this Court which modifies the *Walder* decision in any respect here pertinent, except the possible impact of the *Miranda*, *Simmons* and *Harrison* cases (*infra*).

testimony (the alleged "Philip Barrone" alias and the derivative imputation of fugitivity).* (2) *Walder*, also, as seen, protects the constitutional right of a defendant to take the stand, as against prosecutive "impeachment" or "rebuttal" tactics when such operate to undermine such defendant's right of "fullest opportunity to meet the accusation against him" and "to deny all the elements of the case against him" without fear of "rebuttal" etc. by tainted evidence—here Baratta was "rebutted", with tainted evidence, in a manner which must inevitably go to the issue of his guilt or innocence under the indictment charges as such, for Baratta was inevitably depicted to the jury (by the Government's unconstitutional tactics) as a fugitive from justice, and it goes without saying that proof or supposed proof of fugitivity is or may be decisive of the issue of a defendant's guilt or innocence in the most integral and direct sense of that issue; proof of fugitivity, that is, cannot be regarded as going merely to some "collateral" or "credibility impeachment" aspect of the case; and if a prosecutor wants to bring into a criminal case proof of fugitivity he must do so in his case in chief.

In *United States* v. *Curry*, 358 F. 2d 904, 909-912 (C. A. 2, 1966), the Court below carefully preserved the restric-

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* As noted *supra*, the Government has also suggested that it was aiming at rebuttal of Baratta's assertions of financial hardship, though the Court of Appeals has apparently not expressly approved this suggestion (Appendix A hereto, *infra*). In any event, Baratta in his direct testimony had spoken only of a single occasion when he needed a small loan during the year 1963; the tainted evidence which was supposedly to the contrary related to a situation of nearly one year later. It is specious to suppose that this mass of tainted evidence with its destructively prejudicial impact of imputed fugitivity can be justified by any such financial factor. That would really be a tail wagging a dog to defeat the *Walder* restrictions.

tions of the *Walder* decision, with a single possible exception to be mentioned in a moment; and the facts in *Curry* appear to fit perfectly the factual and doctrinal structure of *Walder*, *i.e.*, the defendant Curry was allowed to be impeached and rebutted only as to matters which he had himself put in issue in his direct testimony and which were plainly "collateral" rather than going to the essence of the question of guilt or innocence of the crime charged. The single possible exception above referred to, which may denote a departure in the *Curry* case from the *Walder* standards, relates to the circumstance that in *Walder* the Court had attached express importance to the fact that the jury in that case had been instructed that the rebuttal evidence must be used for impeachment purposes only; in *Curry* the Court of Appeals sustained the conviction even though no such limiting instructions had been given to the jury, because none had been requested by the defendant (358 F. 2d at p. 912). Likewise in our case no such limiting instructions were requested or given to the jury. However, we submit that in the overall circumstances of our case, where the Government's conduct was so massively more prejudicial than in either *Curry* or in *Walder*, and where defense counsel fought so hard on the *Walder* issues as above described, the failure of defense counsel to go the one short talismanic step further of requesting a limiting instruction, should not avail to save this cryingly unconstitutional conviction.

In *United States* v. *Mullings*, 364 F. 2d 173, 176 (fn.) (C. A. 2, 1966), the Court of Appeals again noted the *Walder* impeachment rule as applying when a defendant has taken the stand and testified on a specific factual point —the Court's reference to this problem in *Mullings* was couched in general language, and with a view to a hypothetical situation not actually presented on the *Mullings*

facts, but we respectfuuly note the *Mullings* case as involving no attrition of the *Walder* rule.

In *United States* v. *Armetta*, 378 F. 2d 658 (CA 2 1967), and *United States* v. *Vanterpool*, 394 F. 2d 697 (CA 2 1967), the Second Circuit again discussed the *Walder* rule, without suggesting any attrition of that rule in any sense that would be unfavorable to our contentions here.

See also *White* v. *United States*, 349 F. 2d 965, 967-968 (C. A. D. C. 1965); and *Lee* v. *United States*, 368 F. 2d 834 (C. A. D. C. 1966), where the *Walder* rule was applied or referred to without any such attritive connotations.

On March 18, 1968 this Court decided *Simmons* v. *United States*, —— U. S. ——, 19 L. ed. 2d 1247. It is interesting that little more than one month later the District of Columbia Circuit, citing *Simmons*, held that the admissibility rule of *Walder*, "However valid it may be in other contexts, seems to be irrelevant where a *Miranda* problem is presented". *Blair* v. *United States*, —— F. 2d ——, 3 Criminal Law Reporter 2160, C. A. D. C., decided May 2, 1968. See also the closely similar decision of the Third Circuit in *Hill* v. *Pinto*, 3 Criminal Law Reporter 2159, C. A. 3, decided April 23, 1968.

Cf. also *Harrison* v. *United States*, decided by this Court June 10, 1968, —— U. S. ——, 20 L. Ed. 2d 1047, 1052, where the Court—although without referring to *Walder*—rejected a contention of the Government that tainted evidence should be deemed unobjectionable on the basis of the defendant's having "made a conscious tactical decision to seek acquittal by taking the stand • • •".

Perhaps the best confirmation that Baratta's fate was sealed before this trial jury by the Government's unconstitutional resort to the *Miranda*-banned and Fourth

Amendment-banned materials, is found in the fact that after the jurors retired to consider the case their first request was to see the exhibits which the Government had thus unconstitutionally succeeded in bringing into the trial proofs (R. 911).

Also, justice requires that, in view of the exceptionally heavy impingement of Baratta's sentence in this case through the imposition of consecutive sentences, attention be called to the prosecutor's argument at the sentencing proceeding where the Government saw fit to show its hand by explicitly boasting that the constitutionally banned search products proved the alleged fugitivity (R. 954-960).

• • •

It remains to note the reasoning of the Court below in affirming Baratta's conviction notwithstanding our contentions in this "Reason" I dealing with the *Walder-Miranda*-Fourth Amendment-*McNabb* points. See Appendix A hereto pp. 12a-17a. The Court of Appeals resolved this entire complex of questions on two bases, (1) that the admittedly *Miranda*-offensive statement had been used only to refresh Baratta's recollection, and (2) that the search products were admissible because there was probable cause for arrest without a warrant. The Court of Appeals found it unnecessary to reach the *Walder* issues at all. This reasoning of the Court of Appeals is, we respectfully urge, at best an egregious over-simplification. From our foregoing detailed description of the Government's tactics and the trial Court's rulings it is evident that the Government was up to much more indeed than merely trying to "refresh recollection". And as regards the second branch of the Court of Appeals' reasoning, that there was probable cause for the arrest, the difficulty (which we think is insuperable) is twofold: (a) The record is devoid of any *litigatedly* established facts on this

issue of "probable cause" as of the time of the arrest or at any time of relevant aftermath prior to the argument and decision of the appeal; the Baratta defense in this case never knew that the Government claimed contemporaneous "probable cause" to arrest, until the appeal stage; nor, in view of the Government's strange juggling of the record facts as to *when* and on *what justification* the arrest was made, did the defense have a reasonable opportunity to put in issue the claim now belatedly made by the Government that the arrest was justified by contemporaneous "probable cause". (b) The juggling of the facts, the machinations of the Government in regard to the *time* and *cause* or *process* justifying the arrest, bring into the task of constitutionally evaluating the Fourth Amendment issues in this case, the test of "the total atmosphere of the case" (*United States* v. *Rabinowitz,* 339 U. S. 56, 66), and of "a particularized evaluation of the conduct of the officers involved" (*Rios* v. *United States,* 364 U. S. 253, 255).

Cf. also *Sabbath* v. *United States,* —— U. S. ——, 20 L. Ed. 2d 828, decided June 3, 1968, invalidating a warrantless arrest and claimedly "incident" search for failure to comply with the standards denoted in 18 U.S.C. §3109 as to announcement of the arresting officers' identity and purpose. The record in the present case is silent as to any of the essential operative constitutional-fact details relating to this standard of the *Sabbath* case, except for a merely general and conclusory statement by one of the arresting officers, Agent Martowski, conveyed in the following colloquy at the trial of the indictment (R. 697):

> "Q. And what did you do when you arrested him, sir? A. I identified myself as a narcotic agent. I said, 'Anthony, you're under arrest for violation of federal narcotic laws.'"

The record contains nothing, either by way of proceedings on any motion to quash the arrest or suppress evidence, or by way of testimony in the trial as such, from which any inference could be justified that the arresting agents announced their identity or purpose before entering Baratta's residence at Greenwood Lake on July 11, 1964. On the contrary, contributing a significant gloss to Martowski's above quoted conclusory trial testimony, is that Agent's further testimony that he arrested Baratta "in the rear bedroom of the house", and that Baratta "was in his underwear". (R. 697). This scarcely bespeaks a *prior* (i.e. on first entering the house) giving of the due announcement of identity and purpose within the meaning of the *Harrison* decision, *supra*.

Perhaps even more interesting is the "authority" adduced by the Court below in support of its strange conclusion that "it clearly appears from the record that the arrest of Baratta was supported by an abundance of probable cause in the form of the information supplied by Bermudez and his fellow narcotic agents, and hence was lawful even without a warrant" (Appendix hereto, *infra*, p. 16a). That "authority" is *United States* v. *Hall*, 348 F. 2d 837, 841 (CA 2 7965), cert. denied 382 U. S. 497. But the Court of Appeals in citing the *Hall* case herein, failed to mention that its own opinion in *Hall* notes that the defendant-appellant Hall "'[c]onced[ed] that such cause [i.e., reasonable cause to believe that Hall had committed a felony] existed * * *'" (348 F. 2d at p. 841). There is no such concession in our case and, again, there is no record whatever from which the needed inference in the Government's favor could be drawn in compliance with due process standards, i.e., on the basis of a record-litigated posture of the constitutional facts needed to determine whether there was "probable cause" for a warrantless arrest of Baratta on July 11, 1964.

Further as regards the afterthought character of the reliance by the Government and the Court below on alleged contemporaneous "probable cause" to arrest, the few judicial expressions which we have been able to find concerning governmental or judicial pretensions of this sort are worth noting. We are aware, of the *dictum* in *Giordenello* v. *United States*, 357 U. S. 480, 488 that, although the arrest warrant involved was held invalid, "this is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant". The *Giordenello* arrest situation, however, was a far different matter from the present one. There the invalid arrest warrant was based on a complaint alleging an offense occurring on the very same day that the warrant was issued (357 U. S. 481); and the warrant was executed on the very next day (357 U. S. 482). Nor did it appear in *Giordenello* (as we maintain it does here) that "reasonable grounds" for the arrest did not exist in any event. The "total atmosphere" in *Giordenello* bears no faintest resemblance to that in our case.

Much more to the point, we submit, on the question of the Fourth Amendment incidence of such "afterthought" reliance on warrantless arrests that "could have" been made, are the following cases:

In *Jones* v. *United States*, 357 U. S. 493, the agents had a daytime search warrant and no arrest warrant. They did not use their daytime search warrant. The Court found that, on the record, the Government's action had depended not on any search incidental to an arrest but on an assertion of probable cause as to commission of an offense and existence of contraband, and this afterthought rationalization the Court declined to accept. In *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, the Court

disapproved a search mainly as being of unreasonable scope; while it also observed that the prohibition agents had sufficient information to make an arrest without a warrant, nevertheless it disapproved the search for the additional reason that it was incident to an invalid warrant of arrest. In *United States* v. *Pollack,* 64 F. Supp. 554, 558 (D.N.J., 1946—per Forman, J.), the Court likewise rejected a similar "afterthought" attempt by the Government to rely on an unused and claimedly valid authority to make an arrest.

Readily distinguishable are *Stallings* v. *Splain,* 253 U. S. 339, 342, and *United States* v. *Rabinowitz,* 339 U. S. 56, 60. In *Stallings,* the original arrest process was held lawful, hence any expression in the case on the permissibility of an afterthought arrest on other grounds would be *dictum.* Even as to such *dictum,* however, the only bearing of the *Stallings* case on the issue is in the factual peculiarities of that case, *i.e.,* it involved the circumstance that, subsequent to the original arrest, new and additional legal cause for detaining the prisoner had arisen (through the institution of removal proceedings) (253 U. S. 343). *Rabinowitz* on this point, is of even less avail than *Stallings,* for the only supposedly pertinent reference in *Rabinowitz* (339 U. S. 60) is to the power of making an arrest upon probable cause that felony was being committed *in the very presence of the arresting officers.*

II. Errors in the instructions to the jury.

A. Confusion of the conspiracy and substantive counts.

The charge as a whole failed to give the jury proper guidance for dealing with the two separate counts (conspiracy and substantive). The result of such confusion in a charge on separate counts is, obviously, that the jurors will necessarily tend to decide the issues under each count

indistinctly, and the defendants become deprived of a fair chance for distinct consideration of the guilt or innocence of each of them on each count.

The charge commenced at R. 847. After preliminaries the Court gave the jury a short general statement that the indictment contains two counts (R. 853). At R. 857 the Court began its instructions on conspiracy. At R. 859 the Court told the jury again, in a general way, that the indictment contains two separate counts and that these must be treated separately. Then the Court went on to instruct in detail as to conspiracy (R. 859-876). At R. 876 the court commenced its instructions as to count two. The Court read count two to the jury (R. 876-877). The Court then read from the statute applicable to Count 2 (R. 878-879). But in so reading from the statute the Court included the *conspiracy* provision, in what ostensibly was a reading to the jury of a statute relating distinctly to the substantive count. And after so reading the statute, the Court in its very next sentence said (R. 879):

> "Now, this crime has elements, each of which must be proven beyond a reasonable doubt, just as with conspiracy there were certain elements that must be proven beyond a reasonable doubt.
>
> "In order to find a defendant guilty of the crime charged in either or both counts 1 and 2 in the indictment, you must be convinced beyond a reasonable doubt with respect to each of the first two counts and with respect to each of the following four elements:"

We call attention to the undifferentiated reference, in the item just quoted, to "this crime" concerning which, as just noted, the court had just finished reading to the jury from statutory language which referred to both substantive and conspiracy offenses; and we call attention also to the lump-

ing together, in the second of the above quoted paragraphs, of "either or both counts 1 and 2" as regards the elements which the jury must find "with respect to each of the first two counts."

In connection with this peculiar business of reading to a jury, undifferentiatedly, both the substantive and the conspiracy language of the statute (21 U.S.C. 174) when supposedly the jury at that juncture is being instructed distinctly on the substantive charge alone, we must call attention to still another and even more odd mishap into which the trial Court fell in its efforts to handle legislation applicable to this case. The item now to be mentioned reveals, we regretfully must say, that the trial Court did not have the needed grasp of the statutory materials. For, at R. 858, near the commencement of the instructions on conspiracy, the Court had told the jury that the conspiracy statute "here pertinent" provides as follows:

> "'If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons does any act to effect the object of a conspiracy, each shall be' guilty of a criminal offense."

It is evident at a glance that the above quoted statutory language is from 18 U.S.C. 371, the general conspiracy statute; it is not from 21 U.S.C. 174, the conspiracy provision on which Count 1 of the present indictment is expressly founded. We emphasize, this indictment is expressly founded on 21 U.S.C. 174, not on 18 U.S.C. 371. Yet the learned trial Judge in this case thought that the instant conspiracy count is a section 371 count. We suggest that from this surprising error of the trial Judge stemmed much if not all of his own subsequent confusion in charging the jury as to the two counts of this indict-

ment. From the fact that the trial Judge thought this was a section 371 conspiracy, plus the fact that when he read the jury the statute which he thought was applicable to the substantive count alone he did not eliminate from his reading the reference to conspiracy in that same statute (21 U.S.C. 174)—from these two facts taken together, we say, it appears that the trial Judge's lack of grasp of the statutory materials went so far as to cause him to think that the second count of the indictment was in some way to be treated as involving a merger of both conspiracy and substantive elements. If what we are saying here seems incredible, we readily concede that what the trial Judge did here is hard to believe. But he did it. He did tell the jury that the conspiracy count in this case is founded on 18 U.S.C. 371 when in fact the indictment itself states that it is founded on 21 U.S.C. 174; and he did read to the jury as the statute applicable to the substantive count, both the substantive and the conspiracy provisions of that statute (21 U.S.C. 174). And, as will appear, the trial Court was later to repeat this same error of reading to the jury both the substantive and conspiracy provisions of section 174 as being supposedly applicable to the substantive count.

In our above description of the portions of the charge which we contend were confusing to the jury for failure to differentiate between the two counts, we had reached the place in the charge where the Court had read to the jury both the substantive and conspiracy provisions of section 174 as supposedly applying to the substantive count alone, and had then gone on to refer to "this crime", etc. (R. 878-879). We now resume our page by page analysis of the charge from that point on.

From R. 879 to R. 884 the Court gave the jury detailed instructions supposedly addressed to the substantive count, but delivered in such a manner as to leave in a state of

confusion from beginning to end the question of differentiation between the two counts; the merged and confused treatment previously described, which had preceded the detailed portion of the charge here referred to (R. 879-884), inevitably disoriented the entire ensuing portion of the charge, by reason of which the jury must have been severely handicappel to say the least in trying to deal distinctly with the two counts. Without here quoting this portion of the charge (R. 879-884), we contend that from it the jury must have thought that in one way or another their deliberations on the conspiracy and substantive counts were to be conducted on some sort of common, combined or unified basis. We are sure that when this Court examines for itself the portions of the charge above cited it will see that there did occur just this sort of confusion and intermingling of the two counts.

It is true that near the end of the entire charge, at R. 894, the Court again gave a general instruction that the guilt or innocence of each defendant on each count must be determined separately. Yet, in the very next sentence the Court re-confused the jury worse than ever by choosing that juncture in the charge to tell them in effect that they were free to convict any defendant on either count on the same evidence, the Court saying, "Of course, as I discussed previously, in determining the defendant's guilt or innocence on each of these counts you may consider the defendant's entire course of conduct at or near the time when the offenses are alleged to have been committed."

There was soon to be striking indication that the jury were indeed confused as to how to go about dealing separately with the two counts, for, shortly after the jury retired to consider the case they requested "copy charge" (R. 911). This latter request was at first interpreted by

the Court as meaning that the jury wanted to see a copy of the indictment (R. 911-913), but it quickly was made known by the jury that what they wanted was "the Judge's charge to jury" (R. 914). The Court then invited the jury to direct attention to any specific portion of the charge which they wanted to hear (R. 914), and the jury replied "we would appreciate your reading to us definitions of conspiracy and sale" (R. 915). Could there be plainer indication that the jury simply had an entire failure of understanding of the Court's original charge purporting to instruct them as to the two counts separately? After discussion between the Court and counsel, the Court announced that it would re-charge the jury rather extensively on conspiracy and more briefly on "sale" (R. 915-917). The Court then repeated essentially the same charge on conspiracy which it had originally given (R. 917-931); and at R. 932-939 the Court charged the jury as to the substantive count. The continuing vice in the renewed charge was that, for the second time, the Court, in reading to the jury the statute applicable to the substanive count, again read the conspiracy provision together with the substantive provision (§174), and again went on immediately to introduce its further discussion of the elements by using the words "in connection with this crime", thereby again conveying to the jury that in some manner count 2 involved a merger of substantive and conspiracy charges.

Unfortunately, the defendants did not except to the charge on the grounds above urged, but where a charge as a whole and in respects so fundamental is so confusing, and indeed must have had the effect of operating to make conviction on both counts more likely because the jury were in effect encouraged to convict on both counts if they found guilt on one, the point deserves to be considered by an appellate court as "plain error". *Cf. United States* v. *Persico*, 349 F. 2d 6 (C. A. 2 1965).

B. Failure to charge as to knowledge of illegal importation.

Doubtless as a by-product of the trial Court's above described confusion concerning the two counts and its lack of grasp of the statutory material, the Court failed to instruct the jury at all concerning the Government's burden to prove knowledge of illegal importation of narcotics under the conspiracy count. The Court did instruct the jury concerning this topic under the substantive count (R. 880-881). The failure so to charge as to the conspiracy count was duly excepted to (R. 895-896, 904); and see Monastersky's request to charge No. 1. The procedure here followed by the trial Court—refusing to charge as to knowledge of importation under the conspiracy count while giving such a charge on the substantive count—appears to be identical with that which the Second Circuit disapproved in *United States* v. *Massiah*, 307 F. 2d 62 (C. A. 2, 1962), reversed on other grounds 377 U. S. 201.*

C. The charge on reasonable doubt.

At R. 891 the Court, which had theretofore given the jury, near the commencement of the charge, rather standard and unexceptionable instructions on reasonable doubt and presumption of innocence (R. 853-857, 890-891), totally destroyed the benefit of those instructions by giving the jury the following specially weighted "final" instructions on reasonable doubt near the end of the charge:

> "In the final analysis, then, if you find that the evidence respecting each defendant is as consistent

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* Paradoxically, the one way of "saving" the charge on this point would be to agree with us in our contention "A", above, that the charge prejudicially obliterated the distinction between the two counts and treated both as one.

with innocence as with guilt *or that it is more likely that each defendant is innocent than guilty*, then you should acquit each defendant." (Emphasis added.)

Thus, just before the jurors were being readied by the Court for their departure into the jury room to consider this case, they were told with special and "final" emphasis that they were free to consider whether "it is more likely that each defendant is innocent than guilty".

In *United States* v. *Guglielmini*, 384 F. 2d 602, 606-607 (C. A. 2, 1967), the Second Circuit disapproved an instruction on reasonable doubt which included reference to "a probability of innocence"; the Court in *Guglielmini* equated those words to "belief that innocence is *more likely* than not". This theme of "more likely" innocence which the Court disapproved in *Guglielmini* embodies the very words which the Court below used in our case.

In *United States* v. *Hughes*, 389 F. 2d 535, 537 (C. A. 2, 1968), the Second Circuit expressly condemned use of the same language used by the trial Judge in the instant case.

No exception was taken to the above charge in this case. On the authority of the *Guglielmini* and *Hughes* cases, where likewise an exception had not been taken, we invoked the "plain error" rule in the Court below, but to no avail (Appendix hereto, *infra*, p. 23a).

III. In the overall circumstances of this trial record Petitioner Baratta is the victim of double punishment for a single offense.

We hereby request renewed consideration of the oft-waged issue of duplicity between a conspiracy and a substantive count.*

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* The following presentation substantially repeats an argument in the petition for certiorari in No. 245, Oct. Term 1968, *Taller* v. *United States*, pp. 19 *et seq.*, which was written by the same counsel as here (Mr. Glasser).

This case involves consecutive sentences. It involves also a practically identical subject matter under both counts, *viz.*, the alleged dealings of the defendants which culminated in the alleged sale of heroin on September 24-25, 1963; factually, the conspiracy proof in this case is indistinguishable from the substantive proof; and for all practical purposes the *corpus delicti* is the same under both counts.*

We realize this case is not unique in the respects just mentioned. Other cases likewise have involved consecutive sentences and practical identity of subject matter under conspiracy and substantive counts. However, we think that this case comes before this Court at a time, in the development of the law, which makes our request for reconsideration of the duplicity problem appropriate.

In recent decisions the Court below has rather drastically recast the standards for instructions to juries as to the sequence of deliberate steps needed on the part of the jurors (and of the trial Judge) in order to allow the jurors to consider the "hearsay" acts and declarations of co-defendants or co-conspirators as proof of guilt against a particular defendant. *United States* v. *Stadter,* 336 F. 2d 326 (C .A. 2, 1964), cert. denied 380 U. S. 945; *United States* v. *Nuccio,* 373 F. 2d 168 (C. A. 2, 1967), cert. denied 18 L. Ed. 2d 623; *United States* v. *Ragland,* 375 F. 2d 471 (C. A. 2, 1967). The law in these respects formerly was that the jurors had to be instructed to consider first whether the Government had proved the existence of a conspiracy (for the determination of which the standards

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* This practical identity of subject matter and proof under the two counts does not excuse, of course, the trial Court's failure to charge the jury properly as to separate consideration of the two counts ("Reason" II-A, *supra*). Indeed, that failure played an integral part in bringing about double punishment for a single offense.

of proof and jury instruction were apparently never worked out in a perfectly coherent way as regards consideration of "hearsay"); second, whether the knowing participation of each defendant in the conspiracy had been proved (which in turn needed to be determined by proof "aliunde" or independent proof as to the acts or declarations of the particular defendant without recourse to "hearsay" as to acts or declarations of other defendants or co-conspirators); and, third, upon determination of the existence of the conspiracy and of a particular defendant's knowing participation therein, the jurors could then consider unlimitedly the co-conspiratorial "hearsay". As to these former requirements, see, *e.g.*, Mathes and Devitt, *Federal Jury Practice and Instructions* (1965), §25.05 *et seq.*, pp. 236-241.

In our case the trial judge gave the jury the more simplified instructions favored in the *Statder, Nuccio* and *Ragland* cases, *supra* (R. 862-869, 871-873).

Such instructions—and the guidelines of the Court below on which they are apparently based (*Stadter, Nuccio, Ragland, supra*)—for all practical purposes eliminate effective guidance to the jury to enable them to determine the question of individual membership by "independent evidence" relating to each defendant and the proper consideration of "conspiracy hearsay" to determine ultimate individual guilt.

In the past, notwithstanding many grumblings even in this Court itself, the Government has almost always been indulged in its zealous practice of combining conspiracy and substantive counts dealing with the same subject matter, but there have been arguably persuasive reasons for allowing this which now seem to us to be no longer applicable in view of the above noted new way that the Court below is apparently disposed to permit trial Judges to

charge juries on conspiracy (*Stadter, Nuccio, Ragland*). If conspiracy instructions no longer need to be concerned with careful delineation as to independent proof of individual membership or as to how hearsay may be considered, then it is hard to see how a conspiracy charge or proof thereof differs meaningfully from a substantive charge involving the same subject matter and more than one defendant.

The idea here being proposed is that, through such virtual equating of the prosecutive-proof procedures for conspiracy and substantive counts, the combining of such counts is indeed duplicitous when the same subject matter is involved.

There are further refinements to this argument. For example, it has traditionally been theorized that prosecutors need the conspiracy weapon in their arsenal because they may not be able to prove actual *achievement* of a crime in the substantive sense but can prove conspiratorial *effort* (proof of success not being necessary for conspiracy conviction). But this theorizing is unrealistic, and unfair, in a case like the present one where the whole thrust of the Government's proof under both counts was success of the narcotics transaction of September 24-25, 1963.

Another refinement of the argument would be that it used to be important for the Government to be allowed to use conspiracy counts because thereby hearsay could be received which would otherwise be inadmissible. But in view of cases like *United States* v. *Campisi*, 248 F. 2d 102 (C. A. 2, 1957), cert. denied 355 U. S. 892, establishing practically unrestricted admissibility of hearsay on an "agency" theory in prosecutions on substantive charges, the supposed policy need for the conspiracy weapon in the prosecution's arsenal based on these hearsay factors appears to be no longer justified.

If, as we contend, all these reasons of policy which formerly were thought to justify the combining of conspiracy and substantive counts involving the same or practically the same transaction have lost their force, has not the time now arrived when a creatively minded Appellate Tribunal should perceive the real impingement of these developments on the sheer issue of duplicity and double punishment in a case of the present kind?

It would be difficult if not impossible to explain to a layman why Baratta is subjected to consecutive sentences in this case in light of the case law evolution above described which has apparently eliminated any *sound* continuing justification for doubling-up, *via* conspiracy and substantive charges, the criminal punishment of a man in circumstances of the kind here presented. Previously, when the doctrines now obsoletized by cases like *Nuccio, Ragland* and *Campisi* were still in force, the puzzled layman could have been answered by a lawyer or a Judge at least on some basis of authentic-seeming legal theory explaining the apparent double punishment. But is it any longer possible now to give such answers to a layman, or, forsooth, to ourselves as lawyers and Judges? Is it any longer possible to avoid the stark conclusion that, in a case of the present kind, the combining of conspiracy and substantive counts is for all practical purposes an instrument for double punishment for the same offense?

In this newly evolved stage of the conspiracy-substantive juridical dynamic in the Federal Courts, there also emerges more distressingly than ever before the familiar problem of the intrinsic inflammatoriness, to the minds of lay jurors, of a charge of "conspiracy". In the present case the trial Judge, in his instructions to the jury concerning the conspiracy count, used expressions which must have inflamed the jurors' minds; the conspiracy aspect of the

case was played up by the trial Judge, we must say, in ill-advised language employing ominous and inflammatory characterizations of "conspiracy" as some sort of especially horrendous public danger. See R. 857-858, 890-892, and the defense exceptions at R. 895, 904.

Thus, the road to double punishment which the petitioner Baratta was forced to travel in this particular case was also for him the running of a gauntlet seared by judicial inflammatoriness all the way.

If we are correct in our contention that the judgment appealed from involves a constitutionally forbidden double punishment, the judgment must be reversed as to both counts, and not merely as to one or the other of the two counts which carry the consecutive sentences. Only in the event of re-trial, and then only in the event of a proper new sentencing, could a sentence as to either of the present counts stand free of the fatal defects here urged.

We realize that in *Gore* v. *United States*, 357 U. S. 387, this Court (although by a vote of 5 to 4) adhered to the doctrine of *Blockburger* v. *United States*, 284 U. S. 299, that Congress may attach double or multiple penalties to a "single" criminal transaction where different Congressional interdictions are shown to be violated.* But the Court below has indicated its own serious concern about this problem by devoting careful analysis and discussion to it in, e.g., *United States* v. *DeAlesandro*, 361 F. 2d 694 (C. A. 2 1966), cert. denied 385 U. S. 842. Cf. *United States* v. *Ketchum*, 320 F. 2d 3 (C. A. 2 1963), cert. denied 375 U. S. 905.

We submit that, somewhere in the four corners of the protections denoted by the due process and double jeopardy

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*Cf. *Callahan* v. *United States*, 364 U. S. 587.

provisions of the Constitution, there ought to be, there must be, a protection against subjecting an accused in a Federal criminal prosecution to duplicitous or multiplicitous charges of crime in the manner here done, if only because the accused is entitled to protection against the prejudicially over-awing effect upon jurors' minds of such double or multiple Grand Jury accusations.

Nor should the ultimate constitutional questions of due process and double jeopardy in a case of this type be permitted to be reductively disposed of simply on the basis of the ultimate impingement of "concurrent" *versus* "consecutive" or cumulative sentencing. Sheer considerations of clarity and fairness in submitting cases to juries must be given weight. Jurors who are told that they may adjudge a defendant's guilt or innocence under multiple charges arising from a single subject matter are *ipso facto* placed in a state of mind of more stern potential condemnatoriness in proportion to the number of those multiples. It respectfully seems to us unrealistic to ignore this simple "fact of life" under the jury system.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
HERMAN EDELMAN,
Attorneys for Petitioner,
Anthony Baratta.

August , 1968.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 289—September Term, 1967.

(Argued February 21, 1968 Decided June 21, 1968.)

Docket No. 31744

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY BARATTA, SAMUEL MONASTERSKY, and ROCCO SANCINELLA,

Appellants.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and GIGNOUX, *District Judge.**

Appeal from judgments of conviction of violations of 21 U. S. C. §§173, 174 entered after jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, *J.* Affirmed.

ABRAHAM D. SOFAER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of

* Of the District of Maine, sitting by designation.

New York, David M. Dorsen, Assistant United States Attorney, of counsel), *for appellee.*

ABRAHAM GLASSER, New York, N. Y. (Herman Edelman, New York, N. Y., of counsel), *for appellant Anthony Baratta.*

THEODORE KRIEGER, New York, N. Y., *for appellant Rocco Sancinella.*

ALBERT J. KRIEGER, New York, N. Y., *for appellant Samuel Monastersky.*

GIGNOUX, *District Judge*:

Appellants Anthony Baratta, Samuel Monastersky and Rocco Sancinella here appeal their convictions of violations of 21 U. S. C. §§173, 174 (1964) relating to the unlawful importation and distribution of narcotics.[1] The indictment

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1 21 U. S. C. §173 prohibits, except under certain very limited circumstances, the importation of narcotic drugs into the United States. 21 U. S. C. §174 provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned not less than five or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

was in two counts. The first count charged each appellant with conspiracy to violate the above-mentioned statutes, such a conspiracy being specifically made illegal by section 174. The second count alleged that each appellant was guilty of a substantive violation of these sections as well.[2] All three appellants were convicted on both counts after a four day jury trial. Baratta was sentenced to five years imprisonment on the conspiracy count and ten years on the substantive count, to run consecutively. Monastersky was given concurrent ten year sentences on each count. Sancinella received consecutive sentences of five and eight years on the conspiracy and substantive counts respectively. Their appeal presents three issues which merit discussion: (1) Baratta's claim that the Government improperly used against him at trial a statement obtained from him in violation of the *Miranda* doctrine and objects illegally seized at the time of his arrest; (2) the contention of Monastersky and Sancinella that there was insufficient evidence of their knowledge of illegal importation of the narcotics to sustain the jury's verdict; (3) Baratta's contention that various errors in the trial court's charge, either individually or cumulatively, deprived him of a fair trial. Upon a consideration of the entire record, we feel that there was adequate evidentiary support for the verdict and that no prejudicial error has been committed. We therefore affirm the convictions of all appellants.

The Government's evidence, consisting mainly of the testimony of federal and local narcotics agents, tended to establish the following sequence of events.

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2 These appellants were indicted together with one Anthony Verzino and one America Vega. Verzino pleaded guilty before trial and Vega, who had been indicted on the conspiracy count only, was convicted on that count but is not involved in this appeal.

On July 15, 1963, at about 11:15 p.m., George Bermudez, a New York City Police undercover narcotics agent, entered the Sonnet Lounge on the East Side of Manhattan. About one hour later he was joined there by one Ralph "Rufus" Ciccone, who informed him, "My man is here. Did you see him?" Upon Bermudez' negative reply, Ciccone brought over to him the appellant Samuel Monastersky, who had been seated in the bar when Bermudez had arrived. Ciccone introduced the two and asked Monastersky to assure Bermudez, who was posing as a purchaser of narcotics, that "everything is okay." Monastersky replied, "It's like Rufus said, everything will be okay; as far as the three ounces that he owes you, you will get it." Bermudez asked when he would get the promised three ounces, and Monastersky stated, "As soon as my man comes back from out of town." After Monastersky had left the bar, Ciccone informed Bermudez that Monastersky was "the big man" and that the person who was out of town was one "Tony Vase," afterwards identified as Anthony Verzino.

On July 18, 1963, at about 11:00 p.m., Bermudez met Ciccone and Monastersky at the 292 Club at 292 East 149th Street in the Bronx, where he was assured by them that he would get the three ounces and was instructed by Monastersky to return at the same time the following evening. At about 11:00 p.m. the following evening Bermudez found Monastersky and Ciccone at the 292 Club and asked Ciccone "Am I gonna get it?" Monastersky answered, "Wait a while, Tony will be here in a little while. We'll know a little bit better when he gets here." At about 1:00 a.m. Anthony Verzino entered the bar and was introduced to Bermudez by Monastersky. He stated that he understood that Bermudez had received bad goods from Ciccone, and announced that at the request of Monastersky he was

offering to help Ciccone out. The price for a quarter kilogram of heroin was set at $3400 instead of Verzino's normal price of $4300 to make up for some of the money that Bermudez had lost in his dealings with Ciccone. Delivery was to be arranged through Ciccone.

On July 29, 1963 Bermudez encountered Verzino at the Vertigo Bar on Second Avenue and asked him about the deal that they had arranged. Verzino replied that Bermudez had not yet been "checked out" and that they would be meeting in the future.

On September 21, 1963, at about 2:00 a.m., Bermudez telephoned the 292 Club and spoke to Monastersky, who invited him over. Arriving at the club a short time later, Bermudez explained to Monastersky that he had been in Florida for some time and that he had heard that Ciccone was dead. Monastersky asked if Bermudez was still interested in the deal, and upon Bermudez' affirmative reply, stated that he had "some very good top goods right now." Bermudez asked about the price of a quarter kilogram. Monastersky then called over appellant Rocco Sancinella, who informed Bermudez that the price would be $4000. Bermudez demurred, reminding Monastersky that this was not what they had spoken about. Sancinella then walked over to Verzino, who was also in the bar. A moment thereafter the latter motioned Bermudez over to him and told him that the lowest possible price would be $3900. Despite Bermudez' objections, Verzino stuck to this price and Bermudez finally agreed.

Arrangements were then made for the sale. Verzino instructed Bermudez to park his car somewhere around 15 blocks from the 292 Club, leaving the money in the trunk. He was then to take a cab to the bar and give Verzino his

keys. It was estimated that the whole transaction would take no more than one hour.

On September 23, at around 11:00 p.m., Bermudez again met Verzino and Sancinella at the 292 Club and stated that he was interested in purchasing an eighth of a kilo of heroin that evening. Verzino, however, refused to break a quarter kilo package and again outlined the procedure for the actual delivery. Bermudez then agreed to return the following evening with the $3900 for a quarter kilo. On Bermudez' inquiry as to the quality of the goods, Sancinella assured him, "It's 86 per cent."

The following evening, after conferring with other federal and local narcotics agents, Bermudez drove his car to East 143rd Street between St. Ann's Avenue and Brook Avenue in the Bronx, parked it there and took a cab to Courtland Avenue and 149th Street. He arrived at the 292 Club on foot at around 8:30 p.m. and met Verzino, who was just entering the bar. Moments before, Verzino had been observed in conversation with appellant Anthony Baratta, who had driven off in a black Cadillac convertible at the conclusion of the conversation. Verzino informed Bermudez that had he arrived at 8:00 p.m. the purchase and delivery could have been made at that time, but that as it was he would have to wait until around 10:00 p.m. Bermudez said he did not mind waiting and they entered the bar. Once inside, Bermudez informed Verzino that contrary to instructions, he had not left the money for the narcotics in his parked car, but had brought it along with him to the bar because of his apprehension that some dispute as to the amount might arise if he did not personally deliver the money to Verzino. Verzino expressed no objection to such a procedure and suggested that they go into the kitchen and count the money. In the kitchen

Verzino and Bermudez found Monastersky and Sancinella, who were cooking spaghetti and meatballs. At the request of Verzino, Monastersky and Sancinella each assisted in counting a portion of the money that Bermudez produced. The counting revealed that the $3900 was all there, the money was returned to Bermudez, and Verzino and Bermudez returned to the bar followed by Sancinella and Monastersky.

At about 9:50 p.m. one America Vega entered the 292 Club and asked to speak privately with Verzino. After he had spoken with her briefly, Verzino walked over to Bermudez and asked him for his car keys. The latter handed them over along with a piece of paper describing the car and its location. These were given to Vega, who put them in her pocketbook and, after having a drink with Verzino and Bermudez, left the bar.

About 15 minutes thereafter, Baratta entered the 292 Club and walked over to Verzino, who said, "Here's my delivery man." Verzino and Baratta left the club together, and Bermudez followed a minute or two later. Bermudez saw Baratta sitting in a black Cadillac convertible parked on Courtland Avenue just off 149th Street and Verzino standing beside the car. He turned and started back to the club and was joined a few moments later by Verzino, who stated, "It won't be long now." Baratta was then observed proceeding in the Cadillac to East 148th Street, where he entered the passenger side of a 1963 Oldsmobile already occupied by another individual. A moment later, both persons emerged from the Oldsmobile, Baratta carrying a package and a light colored raincoat. They got into the Cadillac and Baratta drove it away. After driving repeatedly through East 149th Street they proceeded to a building at 435 West 238th Street in Riverdale. One of the

occupants of the car entered the building and returned shortly, and the car was driven back to the Bronx. At about 10:30 p.m. Baratta was observed parking the Cadillac behind Bermudez' Rambler and then grasping the handle of the Rambler's door. He did not open the door but returned to the Cadillac and proceeded to cruise around the neighborhood.

Meanwhile, Bermudez waited at the 292 Club. At about 11:30 p.m. he complained to Monastersky, "It's taking too long." The latter reassured him, "Take it easy, kid. Don't worry about it. Everything will be okay . . . He'll be here." Half an hour later Bermudez asked Sancinella, "What's going on here? . . . I'm here since 8:30." Sancinella replied, "Kid, don't worry. If Tony said you got it, you got it. Just sit tight and wait."

Near midnight Vega entered the club. Verzino, quite agitated, upbraided her, demanding "Where is he now? . . . I don't like this deal. It's taking too long . . . ." She reassured him, "He'll be here, he'll be here." Verzino left Vega with Bermudez temporarily but soon returned and complained again about the delay in consummating the deal. When Vega offered to go find out what had happened, however, Verzino told her to stay where she was and went off himself to make a phone call.

At about 1:45 a.m. on the 25th, Baratta entered the bar and was accosted by Verzino. The two of them walked outside followed by Bermudez. As Bermudez approached, Verzino said, "He's been waiting since 8:30." Baratta turned to Bermudez and said, "I'm sorry, it's my fault. I was held up." Verzino ordered Bermudez back into the bar and then re-entered alone a few moments later and returned to Bermudez his car keys, stating that the

deal would take place right in the bar. Bermudez suggested that the money be recounted and Verzino assented. Verzino and Bermudez then counted out the money in the men's room, while, at Bermudez' request, Sancinella stood guard outside the door to make sure that no one entered while the counting was taking place.

A few minutes later, at about 2:00 a.m., Verzino left the club alone and walked westward to the corner of Morris Avenue and East 149th Street and then continued along toward Park Avenue. At a service station between Morris and Park Avenues, Verzino and Baratta were observed to walk toward each other, and then after a movement of hands between them, to separate almost immediately. Baratta went toward the Grand Concourse, while Verzino returned toward the 292 Club. At about 2:05 a.m. Verzino re-entered the Club with a package, which he put under Bermudez' jacket. He then took out of Bermudez' inside jacket pocket the $3900. The package, which was introduced into evidence, contained a powder which was determined to be composed 43.1% of pure heroin.

The only defendant who offered evidence at the trial was Baratta, who testified in his own behalf. Baratta sought to explain his presence at the 292 Club and his meetings with Verzino during the evening of September 24-25, 1963 by stating that at that time he had been unemployed for some time, that he was destitute, and that he had been seeking to borrow $200 from Verzino, a casual acquaintance. He testified that sometime prior to September 24th he had been told by Verzino to come to the 292 Club the following week and that Verzino might have some money for him. Baratta stated that when he first arrived at the club, he was told by Verzino that the $200 was not then available, but that it might be later on in the evening. Lacking carfare to

return home, Baratta accepted Verzino's offer of the use of his Cadillac. He testified that he returned to the 292 Club at about 1:00 a.m. on the 25th, but that Verzino was still unable to loan him any money. Somewhat annoyed, Baratta left the bar on foot and started home in a cab. He said that he then remembered that he had not returned to Verzino the keys to the Cadillac, so he left the cab and started to walk back to the 292 Club. Before he reached the club he encountered Verzino, who said that he was looking for him. He handed over the keys, borrowed $5 for cab fare, and never saw Verzino again.

On cross-examination, Baratta testified that he had been living at 435 West 238th Street, Riverdale during the fall of 1963 and that he was living in a rented house at Greenwood Lake, New Jersey at the time of his arrest in the summer of 1964. He stated that at the time of his arrest he was using his own name and denied that he had been living under the name of Philip Barrone. During the course of his cross-examination he was handed a piece of paper which had been identified *in camera* as a statement taken from Baratta shortly after his arrest, and was asked whether this refreshed his recollection as to whether he had ever lived under the name of Philip Barrone. He replied in the negative. The jury was not told what the piece of paper was or what it contained. Baratta was also shown documents reflecting the purchase of a Chris-Craft boat and a 1964 Buick automobile by one Philip Barrone, as well as a baptismal certificate, an automobile registration, a driver's license and a check book in that name. He denied that he had ever seen these documents before or that they were in his possession at the time of his arrest.

In rebuttal, the Government offered the testimony of narcotics agent David Martowsky, one of the officers who

had arrested Baratta at Greenwood Lake. Agent Martowsky identified the various documents which had been shown to Baratta on cross-examination as having been found and seized at the time of Baratta's arrest in the room where he was arrested and in a red Thunderbird automobile parked in the driveway of his house. These documents were then offered and received into evidence.

I.

First of all, Baratta contends that the use of his prior written statement to "refresh his recollection" on cross-examination violated the rule laid down by the Supreme Court two years after his arrest in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The Government concedes that the statement had not been taken in accord with the procedure required by *Miranda* but urges that the use of the statement merely to refresh Baratta's recollection on the witness stand, where the statement was not identified, read, or otherwise independently presented to the jury, and where Baratta testified that his recollection was not refreshed, could have had no prejudicial effect against Baratta which would require that his conviction be vacated. Alternatively, the Government maintains that the use of the statement for collateral impeachment purposes was proper under the doctrine of *Walder* v. *United States*, 347 U. S. 62 (1954) as applied in this Circuit in *United States* v. *Curry*, 358 F. 2d 904, 910-912 (2d Cir.), *cert. denied*, 385 U. S. 873 (1966) and *United States* v. *Armetta*, 378 F. 2d 658, 661-662 (2d Cir. 1967). See also *United States* v. *Mullings*, 364 F. 2d 173, 176 n. 3 (2d Cir. 1966). Since under the circumstances of this case we are in accord with the Government's first position, it is not necessary to de-

termine the validity of its second and alternative contention.

The statement in question was a written question and answer statement obtained from Baratta by an Assistant United States Attorney who interviewed him shortly after he was arrested on July 11, 1964.[3] Among Baratta's recorded answers there was apparently an admission that at the time of his arrest he was using the name of Plilip Barrone. The Government readily admits that prior to giving the statement in question Baratta had not been fully informed of his constitutional rights to remain silent and to consult with counsel, and agrees that the statement was inadmissible in evidence under the doctrine of *Miranda*. However, in the present case, the statement was not admitted into evidence or identified as a statement or admission. Nor were its contents imparted to the jury in any way. The prosecutor merely handed the statement, a piece of paper, to Baratta during his cross-examination and asked if reading it would refresh his recollection as to whether he had ever gone under the name of Barrone.

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3 Throughout the proceedings below there was considerable confusion as to when Baratta had actually been arrested. On February 15, 1965 Baratta's counsel filed a motion for suppression of evidence seized at the time of his arrest. The sole ground for this motion was that Baratta had not been brought before a United States Commissioner in the District in which he was arrested and that no hearing had been held directing his removal to the Southern District of New York pursuant to Fed. R. Crim. P. 40(a). At the time of this motion Baratta's counsel was concededly under the misapprehension that Baratta's arrest had occurred on July 13, 1964, the date on which a formal complaint against Baratta was filed with the United States Commissioner in New York. This misapprehension was shared by the presiding judge, who denied the motion stating that "the defendant was arrested on July 13 on the basis of a complaint . . . . properly filed with the U. S. Commissioner." Actually, as finally came out at trial, Baratta was arrested on July 11, 1964 without a warrant, and the complaint very likely was filed at his preliminary examination on July 13.

It is basic evidence law that a witness' recollection may be properly refreshed by writings and papers which are not in themselves admissible in evidence, *e.g.*, 3 *Wigmore on Evidence* §§758-765 (3d ed.), and that the propriety of refreshing a witness' recollection on cross-examination lies largely within the sound discretion of the trial judge. 3 *Wigmore* §765; *United States* v. *Graham*, 102 F. 2d 436, 441 (2d Cir.), *cert. denied*, 307 U. S. 643 (1939); *United States* v. *Lombardozzi*, 335 F. 2d 414, 417 (2d Cir.), *cert. denied*, 379 U. S. 914 (1964). The question is, though, whether the use made of Baratta's statement in the present case was such a use as is precluded by *Miranda*. Although we can certainly conceive of situations where the use of an improperly obtained statement, not itself admitted into evidence or read to the jury, would violate *Miranda*, under the circumstances of the present case we find that the statement as such could have had no impact on the jury and that any error which might have been committed was harmless. Even if the jury did get some inkling that the statement was an admission by Baratta that he had used the name Barrone at some time in the past, such an admission would have been merely cumulative to the massive documentary evidence on this point that was offered by the Government in rebuttal. If this documentary evidence was properly admitted, as we hold it was, *infra*, it is inconceivable that the jury's verdict was "substantially swayed by the error," *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946), or that there is even "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U. S. 85, 86-87 (1963). On the record before us we are convinced that no prejudice could possibly have resulted from the use made of Baratta's statement.

See *United States* v. *Castellana*, 349 F. 2d 264, 276 (2d Cir. 1965), *cert. denied*, 383 U. S. 928 (1966); *United States* v. *Guerra*, 334 F. 2d 138, 143-147 (2d Cir.), *cert. denied*, 379 U. S. 936 (1964).

In addition, Baratta attacks the admission into evidence of the various documents seized by federal agents at the time of his arrest at his home at Greenwood Lake. These items, together with $5260 in cash, were found at the time of Baratta's arrest in the bedroom where he was arrested and in a Thunderbird automobile parked in the driveway at the house. Baratta maintains that because the federal agents did not have a search or arrest warrant at the time of his arrest these articles were unlawfully seized and hence inadmissible under the doctrine of *Weeks* v. *United States*, 232 U. S. 383 (1914). The defect in this contention is that it clearly appears from the record that the arrest of Baratta was supported by an abundance of probable cause in the form of the information supplied by Bermudez and his fellow narcotics agents, and hence was lawful even without a warrant. *United States* v. *Hall*, 348 F. 2d 837, 841 (2d Cir.), *cert. denied*, 382 U. S. 947 (1965). And a search incident to such a lawful arrest may be properly carried out without a search warrant. *United States* v. *Rabinowitz*, 339 U. S. 56 (1950); *Agnello* v. *United States*, 269 U. S. 20, 30 (1925). See also *Ker* v. *California*, 374 U. S. 23 (1963). The contemporaneous search of the room in which a defendant is properly arrested and a car, admittedly belonging to the defendant, parked in the driveway of the premises on which he was arrested is clearly a search incident to a lawful arrest. E.g. *United States* v. *Francolino*, 367 F. 2d 1013, 1016-18 (2d Cir. 1966), *cert. denied*, 386 U. S. 960 (1967); *Browning* v. *United States*, 366 F. 2d 420, 422 (9th Cir. 1966). Com-

pare *United States* v. *Rabinowitz, supra,* and *Harris* v. *United States,* 331 U. S. 145 (1947) and *Abel* v. *United States,* 362 U. S. 217, 234-240 (1960) and *Cooper* v. *California,* 386 U. S. 58 (1967) and *Warden, Maryland Penitentiary* v. *Hayden,* 387 U. S. 294 (1967) with *Preston* v. *United States,* 376 U. S. 364 (1964) and *Kremen* v. *United States,* 353 U. S. 346 (1957). We therefore conclude that the items seized as a result of this search were properly admitted into evidence at Baratta's trial.[4] Having sustained the legality of the search and seizure, we do not consider the Government's alternative contention that, even if these documents were illegally seized, they were nevertheless admissible in evidence under the rule of *Walder* v. *United States, supra,* to impeach Baratta's testimony on a collateral issue.

II.

Both Monastersky and Sancinella claim that the evidence adduced against them at the trial was insufficient to establish the knowledge of illegal importation necessary for conviction of the crimes with which they were charged. It is not a crime under 21 U. S. C. §174 for a person to deal in narcotic drugs, unless it is shown that the person did so "knowing the same to have been imported or brought into the United States contrary to law." See *United States*

4 When the items in question were offered and received in evidence, Agent Martowski testified that at the time of the arrest and search he had asked Baratta whether the Thunderbird automobile, the $5260 in cash found therein, the auto registration certificate and the driver's license belonged to him, and that Baratta had replied in the affirmative. It is not clear whether Baratta now complains of the admission of this testimony as a violation of the *Miranda* rule, but even if such responses are not properly admissible under *Miranda,* a question which we do not here decide, on the record as a whole, their admission in evidence cannot be said to have prejudiced this defendant. See *United States* v. *Castellana, supra; United States* v. *Guerra, supra.*

v. *Santore*, 290 F. 2d 51 (2d Cir. 1959), *reheard en banc*, 290 F. 2d 74 (2d Cir. 1960), *cert. denied*, 365 U. S. 834 (1961); *United States* v. *Hernandez*, 290 F. 2d 86 (2d Cir. 1961). However, section 174 also provides that "[w]henever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." Since the record in the present case is bare of any direct evidence that either Monastersky or Sancinella had actual knowledge of illegal importation, their convictions may only be sustained by sufficient evidence that they had such "possession" of the narcotics as would support the statutory inference. It is well established that a person may have possession for the purposes of section 174, even though he does not have physical custody, so long as he has dominion and control over the narcotics. *United States* v. *Jones*, 308 F. 2d 26, 30 (2d Cir. 1962); *United States* v. *Hernandez, supra* at 90. As this Court has recently stated, possession may consist of "a working relationship or a sufficient association with those having physical custody of the drugs so as to enable [one] to assure their production, without difficulty, to a customer as a matter of course . . ."; but, on the other hand, "a casual facilitator of a sale, who knows a given principal possesses and trades in narcotics but who lacks the working relationship with that principal that enables an assurance of delivery, may not be held to have dominion and control over the drug delivered and cannot be said to have possession of it." *United States* v. *Jones, supra;* see also *United States* v. *Hernandez, supra; United States* v. *Santore, supra* at 76. Applying this test, after a close examination of the present

record, we find that the evidence was sufficient to sustain the convictions of both of these defendants.

Turning first to Sancinella, the record reveals that his role in the events surrounding the sale of narcotics to Bermudez was far more than that of a casual facilitator. First of all, Sancinella was present during much of the negotiations for the purchase and participated actively in them. He quoted a purchase price and also specified the quality of the goods. Further, he was present on the night of the delivery and was able to assure Bermudez that delivery would in fact be made, despite the long delay. He was entrusted to help count the purchase money in the kitchen and to guard the men's room while it was being recounted. This evidence of Sancinella's involvement is substantially greater than the evidence which we held insufficient in *United States* v. *Jones, supra.* It indicates that Sancinella was an integral part of the narcotics distribution operation and that he enjoyed a close and continuous working relationship with those who had actual possession of the narcotics. This working relationship was enough to constitute possession of the narcotics and to support the statutory inference. See *United States* v. *Beigel,* 370 F. 2d 751, 756 (2d Cir.), *cert. denied,* 387 U. S. 930 (1967) (Beigel), 387 U. S. 936 (1967) (Verzino); *United States* v. *Lopez,* 355 F. 2d 250 (2d Cir.), *cert. denied,* 384 U. S. 1013 (1966); *United States* v. *Rivera,* 346 F. 2d 942 (2d Cir. 1965); *United States* v. *Carter,* 320 F. 2d 1 (2d Cir. 1963); *United States* v. *Douglas,* 319 F. 2d 526 (2d Cir. 1963); *United States* v. *Ramis,* 315 F. 2d 437 (2d Cir. 1963); *Lucero* v. *United States,* 311 F. 2d 457 (10th Cir. 1962), *cert. denied* sub nom., *Maestas* v. *United States,* 372 U. S. 936 (1963).

With respect to Monastersky, the evidence as to his possession is even more substantial. It was at his request in the first place that Verzino offered to help out Ciccone in his dealings with Bermudez. He participated actively in the negotiations, especially in the beginning, and like Sancinella was involved in the counting of the money. He was the one who "checked out" Bermudez as a potential customer, and he was at various times able to assure Bermudez of the quality of the goods and of delivery. It is clear that he had a working relationship with the actual possessors of the narcotics sufficient to assure production of the goods at any time, and thus sufficient to support the statutory inference. See *United States* v. *Beigel, supra; United States* v. *Lopez, supra; United States* v. *Rivera, supra; United States* v. *Carter, supra; United States* v. *Douglas, supra; United States* v. *Ramis, supra; Lucero* v. *United States, supra.*

III.

Baratta has urged that the trial court's charge was erroneous in the following four respects: (1) The trial judge erred in charging the jury as to the first count in the language of the general federal conspiracy statute, 18 U. S. C. §371 (1964), rather than in the language of the conspiracy portion of 21 U. S. C. §174 under which the defendants were in fact indicted; (2) In his charge on the conspiracy count the trial court failed to instruct the jury that knowledge of illegal importation of the narcotics is an essential element of the crime of conspiracy under section 174; (3) During his explanation to the jury of the statutory inference of knowledge of illegal importation from possession the court used the statutory language "unless the defendant explains the possession" in derogation of the defendants' Fifth Amendment rights; (4) The

court used language which would allow the jury to employ a preponderance of evidence standard in determining the guilt or innocence of the defendants. Baratta further maintains that even if no single one of these alleged errors would require reversal of his conviction, taken cumulatively, they cast sufficient doubt on the fairness of his trial as to make a new trial mandatory. We hold that, although the charge was erroneous in several respects, the errors were not sufficiently egregious or likely to have caused prejudice to warrant reversal when, save as to item (2), no adequate objection was made.

With respect to the first error alleged, it does seem clear from the record that the trial court charged the jury as to the first count under the general conspiracy statute rather than the conspiracy clause of section 174. However, there was no exception taken to this portion of the court's charge, and this is precisely the type of error that could have been corrected had it been brought to the trial judge's attention. Moreover, it is difficult for us to see how the defendant could have been prejudiced by this mistake. See *United States* v. *Massiah*, 307 F. 2d 62, 68, 70 (2d Cir. 1963), *rev'd on other grounds*, 377 U. S. 201 (1964). At any rate, we do not consider that it was such "plain error" as to justify reversal of the convictions in the absence of exception below. See Fed. R. Crim. P. 30, 52(b).

The next error assigned by Baratta is a more serious one. In *United States* v. *Massiah, supra* at 69-71, a majority of the court held that failure to instruct the jury that knowledge of illegal importation is an essential element of a section 174 conspiracy was plain error, see Fed. R. Crim. P. 52(b), requiring reversal even without timely exception by the defendant. As the court there said, "In a criminal case, the defendant is entitled to have the jury instructed on all

the elements that must be proved to establish the crime charged." *Id.* at 71. In the present case it is conceded that the trial court did not specifically instruct as to the requirement of knowledge of illegal importation on the conspiracy count, and that counsel for Monastersky and Sancinella took timely exception to this omission.[5] On the other hand, it is also not disputed that the charge adequately informed the jury as to the knowledge of illegal imporation required for the substantive crime and that the trial court did charge that the jury must find that each defendant "wilfully and knowingly joined a conspiracy to violate that substantive law relating to the sale of narcotics." Cf. *United States* v. *Agueci*, 310 F. 2d 817, 824-26 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963); *United States* v. *Bentvena*, 319 F. 2d 916, 938-40 (2d Cir.), *cert. denied*, 375 U. S. 940 (1963). Furthermore, in launching into his discussion of the substantive aspects of the offenses charged, the trial court stated,

> In order to find a defendant guilty of the crimes charged in *either or both* counts 1 and 2 in the indictment, you must be convinced beyond a reasonable doubt with respect to each of the first two counts and with respect to each of the following four elements:
>
> • • • • •
>
> The third element that must be proven beyond a reasonable doubt is that the narcotic drugs were illegally imported into the United States; and, fourth, and this, too, must be proven beyond a reasonable doubt, that each defendant knew that these narcotic drugs had

5 Counsel for Baratta did not except to the charge on this ground. We are not, however, going to hold this against him, since we feel that the point was sufficiently brought to the attention of the trial court by the exceptions of counsel for the other defendants.

been illegally imported into the United States. (Emphasis supplied.)

Although these statements do not take the place of an explicit treatment of the knowledge of illegal importation required for conviction on the conspiracy count, so far as these defendants were concerned any defect in the charge as to this element was cured by the jury's finding of the guilt of all appellants of both the substantive offense and the conspiracy. Since the instruction as to knowledge of illegal importation with respect to the substantive offense was more than sufficient, and since the jury found all appellants guilty of the substantive offense, they must have found that each of them had the requisite knowledge of illegal importation or such possession of the narcotics as to justify the statutory inference, discussed *supra*.[6] Cf. *United States* v. *Bottone*, 365 F. 2d 389, 394-95 (2d Cir. 1966).

The third error alleged is that, in referring to the statutory inference of knowledge of illegal importation from possession of narcotics, the trial court used language tending to undermine the Fifth Amendment rights of the defendants not to be compelled to testify. In his original charge the court explained the statutory inference in the language of the statute, "... such possession shall be deemed sufficient evidence to authorize conviction unless *the defendant* explains the possession to the satisfaction of the jury." (Emphasis supplied.)[7] The use of the word "defendant" in

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6 This was not the case in *United States* v. *Massiah*, *supra*. In *Massiah*, three of the four defendants were charged and convicted only of conspiracy. Moreover, the majority of the court in that case also found that "other statements in the court's general discussion of the law of conspiracy suggested to the jury that knowledge of importation was not necessary. . . ." *Id.* at 70. We find no such statements in the charge before us. Cf. *United States* v. *Agueci*, *supra*.

7 See n. 1, *supra*.

this context has been expressly disapproved by this Court in *United States* v. *Nuccio*, 373 F. 2d 168, 174 (2d Cir.), *cert. denied*, 387 U. S. 906 (1967) and *United States* v. *Armone*, 363 F. 2d 385, 392-393 (2d Cir.), *cert. denied*, 385 U. S. 957 (1966). See also *United States* v. *Gainey*, 380 U. S. 63, 71 n. 7 (1965). But, in the present case, when this slip was called to his attention by exception immediately following the body of the charge, the trial judge corrected his error and reinstructed the jury in more appropriate language, substituting "unless the evidence explains the possession" for "unless the defendant explains the possession." Under these circumstances, we do not hold that his initial slip of the tongue constituted reversible error.[8]

Finally, Baratta claims that the trial judge erred, when toward the end of his charge he stated,

> In the final analysis, then, if you find that the evidence respecting each defendant is as consistent with innocence as with guilt or that it is more likely that each defendant is innocent than guilty, then you should acquit each defendant. If you find that the law has not been violated, you should not hesitate for any reason to return a verdict of not guilty.

In so instructing the jury, the judge used language which this Court has expressly condemned in *United States* v.

---

8 In his discussion of the statutory inference the trial court erroneously designated the section 174 inference as a presumption. See *Bollenbach* v. *United States*, 326 U. S. 607 (1946); *United States* v. *Evans*, 312 F. 2d 556 (2d Cir. 1963). However, although the matter was brought to the court's attention below, it was not raised here on appeal. At any rate, in the light of the judge's charge as a whole on this point, we do not think that the jury was misled by his isolated mistaken use of the word "presumption." See *United States* v. *Ferrara*, 377 F. 2d 16, 18 (2d Cir.), *cert. denied*, 389 U. S. 908 (1967); *United States* v. *Morton*, 376 F. 2d 606 (2d Cir.), *cert. denied*, 389 U. S. 887 (1967); *United States* v. *Nuccio*, *supra*.

Hughes, 389 F. 2d 535, 537 (2d Cir. 1968) as "erroneously allow[ing] the jury to use the preponderance of evidence standard in a criminal case." Cf. *United States* v. *Guglielmini*, 384 F. 2d 602, 606-607 (2d Cir. 1967). In the *Hughes* case, though, the erroneous instruction was combined with a highly improper summation, which was the main ground for vacating the conviction, and the court expressly refrained from determining whether the use of the above language, standing alone, would constitute such plain error as to require reversal even without exception below. 389 F. 2d at 537. In the present case, as in *Hughes*, there was no exception taken to the use of this language, which could have been readily corrected had objection been made, and the trial judge had earlier in his charge fully and correctly defined the burden of proof resting on the Government. In answer to the question reserved in *Hughes*, we hold that under these circumstances the isolated use of this unfortunate phraseology is not one of those "plain errors or defects affecting substantial rights," Fed. R. Crim. P. 52(b), which would call for vacating these convictions. *United States* v. *Witt*, 215 F. 2d 580, 585 n. 4 (2d Cir.), *cert. denied* sub nom., *Talanker* v. *United States*, 348 U. S. 887 (1954); see *United States* v. *Birnbaum*, 373 F. 2d 250, 263 n. 17d (2d Cir.), *cert. denied*, 389 U. S. 837 (1967).

In addition to the claims discussed above, Baratta contends that his conviction should be reversed because of defects in the indictment, because of insufficient evidence of his guilt of the offenses charged, because the indictment was largely based on hearsay testimony of a single narcotics agent, because he is the victim of double punishment for a single offense. These contentions are so patently without merit that they do not warrant discussion.

Affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June, one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.
HON. EDWARD T. GIGNOUX,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY VERZINO, AMERICA VEGA,
Defendants.

ANTHONY BARATTA, SAMUEL MONASTERSKY,
ROCCO SANCINELLA,
Defendants-Appellants.

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

A true copy:

A. DANIEL FUSARO
Clerk
By VINCENT A. CARLIN
Chief Deputy Clerk

Judgment entered 7-24-68.

JOHN J. O'LEAR, JR.
Clerk

APPENDIX C

Statutes Involved

Title 21, Section 173, United States Code

§ 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures* —It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

• • •

Title 21, Section 174 United States Code

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years

and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1963

ANTHONY BARATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

[redacted]
Solicitor General,

[redacted]
Assistant Attorney General,

[redacted]
ROBERT A. PLATT,
Attorneys,
Department of Justice,
Washington, D.C. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 423.

ANTHONY BARATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner, who was tried with three others, was convicted of unlawfully selling heroin and of conspiring to do so. He was sentenced to consecutive terms of ten years' imprisonment on the substantive count and five years' imprisonment for the conspiracy. The court of appeals affirmed (Pet. App. A).

The evidence, the sufficiency of which is not disputed, is set forth in detail in the opinion of the court

below (Pet. App. A. 4-11), on which we principally rely. We add thereto the following comments.

1. The government's proof showed that petitioner was at least the delivery man in a conspiracy to sell a quarter of a kilogram of heroin to an undercover agent at the 292 Club in New York City (Pet. App. A. 7a-9a). When petitioner testified at his trial he sought to explain his presence at the club and several meetings that night with one Verzino, the immediate transferor, through a story that he was impoverished and had come to the club to borrow $200 from Verzino (Pet. App. A. 9a-10a). Since petitioner's explanation of his movements was consistent with the existing testimony, it was important for the government to impeach his credibility by showing that his financial condition was hardly desperate, as he had sworn it was. At the time of his arrest in July 1964, petitioner was living with his family in a large house in Greenwood Lake, New Jersey. On the property was a Thunderbird automobile with $5,260 in the trunk, and in his bedroom were documents reflecting, among other things, the purchase of an 18-foot boat and a new Buick. The documents were in the name "Baronne". It was therefore essential to show that petitioner and Baronne were the same person. Petitioner, when asked on cross-examination whether he had been living under the name Baronne at the time of his arrest, denied that fact. After an *in camera* colloquy, the government was then permitted to show petitioner a piece of paper and to ask him whether it refreshed his recollection on this point. Petitioner replied in the negative. The paper was identified in the *in camera*

conference as a statement, taken from petitioner shortly after his arrest, without having received the warnings subsequently required by *Miranda* v. *Arizona*, 384 U.S. 436,[1] containing an admission that, at the time of his arrest, he was using the name Baronne (Pet. App. A. 10a, 12a). The paper was not, however, described to the jury or admitted into evidence.

The prosecutor was also permitted to show petitioner the various documents seized from the house at the time of his arrest and to inquire if any of these refreshed his recollection as to whether or not he was living under the name Baronne. Petitioner denied that he had seen the documents before or that they were in his possession at the time of his arrest (Pet. App. A. 10a). In rebuttal, the government called narcotics agent Martowsky, who testified that he and other agents had arrested petitioner on July 11, 1964, and had seized the above documents and money from a bureau in his bedroom and from the Thunderbird parked in the driveway. The documents were then admitted into evidence (R. 696-697, 708-716).

2. While petitioner contends that the use of his post-arrest statement was prohibited by *Miranda* v. *Arizona*, 384 U.S. 436, it is clear that *Miranda* is not truly involved. The statement objected to was not introduced into evidence, even for impeachment. Unlike the situation in *Walder* v. *United States*, 347 U.S. 62, on which petitioner primarily relies (Pet. 2), the government did not bring before the jury on a collateral question

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[1] The trial was post-*Miranda*, but the statement ante-dated that decision by almost two years.

some evidence that it was constitutionally precluded from introducing as part of the case-in-chief.[2] Rather, the statement was merely shown to petitioner in the course of cross-examination. As the court of appeals stated (Pet. App. A. 13a): "It is basic evidence law that a witness' recollection may be properly refreshed by writings and papers which are not in themselves admissible in evidence". There is nothing in the record which would have led the jury to suspect that what was shown to petitioner was his own *statement* containing an admission of his prior use of the name Baronne. Moreover, as the court below held (Pet. App. A. 13a), any inkling the jury might have had that such was the content of the document can fairly be said to have had no conceivable impact on the verdict, since that information "would have been merely cumulative to the massive documentary evidence on this point that was offered by the government in rebuttal."[3]

With respect to this documentary evidence, the court of appeals determined that it had been properly seized incident to petitioner's arrest without a warrant by the narcotics agents on July 11, 1964. The court's finding that there was probable cause for the

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[2] We note that in *Walder* the Court found that the circumstances permitted such a course.

[3] These arguments equally extend to petitioner's contention that his statement was taken in violation of *McNabb* v. *United States*, 318 U.S. 332. See Pet. 15-16.

arrest is correct. While the facts establishing probable cause were not litigated with a focus on this issue, it adequately appears from the trial testimony of the agents, as the court below held (Pet. App. A. 14a), that at the time of the arrest the agents had "an abundance of probable cause * * *." The agents' knowledge of petitioner's role in the heroin sale derived from their personal observations at the time. Petitioner's further argument that the agents required a warrant to make the arrest is contrary to express statutory and judicial authority. See 26 U.S.C. 7607(2); *Draper* v. *United States*, 358 U.S. 307; cf. *Ford* v. *United States*, 352 F. 2d 927 (C.A.D.C.) (en banc). Petitioner unjustifiably alleges that the agents made a deliberate attempt to conceal the fact that petitioner's arrest was not made under warrant—because of the circumstance that one of the agents swore out a complaint against petitioner on July 13, 1964, two days after his arrest. As the court below indicated (Pet. App. A. 12a, n. 3), the confusion is regrettable but hardly conspiratorial. (See, also, R. 980-982.) It is hard to see, in any event, why defense counsel's erroneous belief that the arrest had been pursuant to a warrant should excuse his failure to inquire into the probable cause question, which may have equal significance even where a warrant had been obtained. Furthermore, in light of the fact that a warrant was not required, counsel's lack of knowledge that there had been no warrant is without significance. Petitioner's further effort to implicate the prosecutor in this alleged conspiracy of concealment

(see Pet. 10-34) is, as the record shows, baseless. See R. 676-706.[4]

3. Petitioner's contention that the trial court's instructions confused the jury as to the distinctness of the substantive and conspiracy counts is refuted by the very facts recited in the petition (Pet. 44-47).[5] The jury was instructed both at the beginning and near the end of the court's charge that the two counts were distinct and were to be considered separately. Moreover, as petitioner admits (Pet. 48), no objection on the ground of insufficient differentiation of the charge was made at trial. See Rule 30, F.R.Crim.P. In the circumstances, there was patently no "plain error". See Rule 52, F.R.Crim.P. His remaining attacks on the instructions (Pet. 49-50) are also insubstantial. The court below accurately held that insofar as portions of the charge may have been objectionable,

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[4] The court below appropriately found it unnecessary to reach the *Walder* issue with respect to either of petitioner's claims (Pet. App. A. 11a-12a, 15a). We suggest, however, that the use in rebuttal of the various items seized at the time of petitioner's arrest was valid, irrespective of the legality of the seizure. Petitioner purports to distinguish *Walder* on the ground that the rebuttal testimony in this case related to cross-examination whereas in *Walder* the matter rebutted was first alluded to in the defendant's direct examination. On the contrary, the rationale of *Walder*—that a defendant may not take advantage of the Fourth Amendment exclusionary rule to testify falsely free from the risk of rebuttal by evidence which has been illegally seized—applies equally to situations where the false testimony is elicited during proper cross-examination as well as during the direct.

[5] Petitioner here makes no allegation, as he did below (Pet. App. A. 18a-23a), that the court's instructions on the elements of the respective offenses were fatally defective.

petitioner failed to raise the point before the trial court; and in any event the deficiencies were not, in context, prejudicial (Pet. App. A. 19a-21a, 22a-23a).

4. Petitioner's counsel reiterates the argument (Pet. 50-56) advanced by him in the petition in *Taller* v. *United States*, No. 245, this Term, that punishment for conspiracy and a substantive offense subjected petitioner to double jeopardy. The court of appeals rejected this contention along with various others which it characterized as "so patently without merit that they do not warrant discussion" (Pet. App. A. 23a).* The contention is clearly foreclosed by decisions of this Court. *Pereira* v. *United States*, 347 U.S. 1; *Gore* v. *United States*, 357 U.S. 386; *Callanan* v. *United States*, 364 U.S. 587.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

SEPTEMBER 1968.

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*The court also in this way dismissed as frivolous the other questions which petitioner declines to argue in his petition but wishes "preserved in the event of the granting of certiorari" (Pet. 3).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 423

ANTHONY BARATTA,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

ABRAHAM GLASSER,
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New York, New York, 10014,

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ANTHONY BARATTA,

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PETITION FOR REHEARING OF DENIAL OF CERTIORARI

I. Introductory

Our petition for certiorari in this case was denied November 12, 1968, the order of denial stating that "Mr. Justice Douglas is of the opinion that certiorari should be granted".

Petitioner Anthony Baratta hereby respectfully petitions for rehearing of the order denying certiorari. As will appear, we believe that this petition for rehearing complies with Rule 58(2) because it is prompted by "in-

tervening circumstances of substantial * * * effect", consisting of very recent further developments in the case law relating to this case (*infra*); and also because certain "other substantial grounds available to petitioner although not previously presented" justify the filing of this petition for rehearing in that such "other substantial grounds" have come into focus by virtue of those recent case law developments.

Our petition for certiroari argued that *Walder* v. *United States,* 347 U. S. 62 does not justify the use of an admittedly *Miranda*-banned statement which the prosecution used in this case to refresh the "recollection" of petitioner Baratta when he took the stand in his own defense; and that the *Miranda* violation here is not obviated by the fact that the *Miranda*-banned statement was not introduced in evidence but was used ostensibly only to "refresh recollection".

The Court of Appeals, in affirming petitioner Baratta's narcotics conviction, reasoned that it was not necessary to reach the *Miranda-Walder* issue because the *Miranda*-banned statements had not been introduced in evidence but had been used only to "refresh recollection" (Pet. Cert., App. 11a-15a).

The latest case law developments above mentioned relate to the *Miranda-Walder* issue. The chronology of these latest case law developments, with reference to the within certiorari proceeding, is as follows:

Our petition for certiorari was filed August 20, 1968. Certiorari was denied, as above mentioned, on November 12, 1968. On October 27, 1968 we mailed to the Clerk of this Court ten copies of a covering letter with ten photocopies of the decision in *Proctor* v. *United States,* C. A. D. C., decided October 10, 1968; we had first learned of the *Proctor* decision in the October 23, 1968 issue of *The Criminal Law Reporter* which we received on October 24.

At the time we sent to the Clerk our above mentioned letter of October 27, 1968 with the *Proctor* photocopies, it was our information, from the Clerk's Office, that the Court was scheduled to confer on our petition for certiorari on November 1, 1968.

Then, on November 8, 1968 we received another issue of *The Criminal Law Reporter* (issue of November 6) reporting the Second Circuit decision of *United States* v. *Fox*, decided October 18, 1968. The date November 8, 1968, when we first learned of the *Fox* decision, was the Friday before the Armistice holiday. Having been informed as aforesaid that our petition for certiorari was scheduled for conference of the Court on November 1, 1968, there appeared to us on November 8 to be no way of bringing the *Fox* decision to the attention of the Court unless it were to come about that the Baratta petition for certiorari would not be disposed of at the Court's then next scheduled decision day, November 12, 1968; it was our thought that if the Baratta certiorari petition were not disposed of on November 12 we would send the new *Fox* decision to the Court; but then on November 12 the Court did deny certiorari in this case as above stated.

The specific "intervening circumstance", then, which has a part in occasioning this petition for rehearing is the very recent handing down of the *Fox* decision of the Second Circuit. The text of the *Fox* decision is printed as an Appendix to this petition for rehearing.

When previously (October 27, 1968) we sent to the Court the photocopies of the *Proctor* decision of the District of Columbia Circuit, *supra*, we were not permitted to argue or discuss that decision, under the practice of which the Clerk advised us, that such argument or discussion may not be included in a letter form of submission but is permitted only *via* compliance with the Rules as to

printing. Since the *Proctor* decision deals with the same relevant topic as does the *Fox* decision, and since it appears proper for us now to argue and discuss the *Fox* decision in this petition for rehearing, we trust that the Court will permit us also to argue and discuss herein the identical topic in *Proctor*.

II. The *Miranda-Walder* issues as affected by the latest case law.

Fox and *Proctor* both hold that the *Miranda* exclusionary principle overrides the *Walder* permissive principle of "collateral" impeachment; that is, *Fox* and *Proctor* hold that *Miranda*-banned statements may not be used as the basis of *Walder*-type collateral impeachment of a defendant who takes the stand in a criminal case. The reasoning of *Fox*, indeed, is that *Miranda* operates plenarily to ban statements obtained in violation of *Miranda*, *i.e.*, that it is not feasible to try to differentiate any longer, for *Walder* purposes, between (1) "collateral" and impeachment issues and (2) "direct" issues of a defendant's claim of guilt or innocence when he takes the stand (see pp. 3588-3589 of the pagination of the slip opinion in *Fox*, Appendix hereto *infra*).

Fox cites, as having "reached the same conclusion as we do here" (*id.*, p. 3588), the decision in *Groshart* v. *United States*, 392 F. 2d 172 (C.A. 9 1968).*

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* The Ninth Circuit decided *Groshart* March 27, 1968. We are embarrassed that we missed finding the *Groshart* decision before now and that we did not learn of it until we saw the *Fox* decision. We apologize to the Court for not having sooner found the *Groshart* decision, which is in our favor and which we surely had no motive to omit. We do not print the *Groshart* decision in our Appendix hereto, *infra*, because it is officially reported (*supra*); nor do we include in the Appendix hereto the text of the *Proctor* decision, because, as above said, ten copies of that decision were sent to the Court by our covering letter of October 27, 1968.

Thus, it has been held by three Circuits—Second, Ninth and District of Columbia—that *Miranda* overrides *Walder* in the matter of *Miranda*-banned statements.

Let us say at once that we realize all three of those decisions—*Groshart, Proctor, Fox*—involved actual reception in evidence of *Miranda*-violative statements whose evidentiary reception was sought by the Government to be justified under *Walder*, whereas our case involves *Walder* use of a *Miranda*-violative statement to "refresh recollection" rather than as actual evidence received on the record. But we do not think that this supposed distinction between the technical evidentiary record posture in our case and that in *Groshart-Proctor-Fox* with respect to the *Miranda-Walder* problem, is significant.

On the contrary we think this supposed distinction—between *Walder*-based outright evidentiary reception of a *Miranda*-banned statement and ostensible use of such a statement to "refresh recollection"—poses a danger to the *Miranda* principle that is even more insidious than would be the danger of direct assaults against the evidence-exclusion rule of *Miranda*.

For, it does not require much imagination on the part of a realistically minded Judge or lawyer to see what will inevitably happen if police and prosecutors are assured—as the thus far unreversed decision of the Second Circuit in our present case assures police and prosecutors—that they do not need to worry anymore about *Miranda* violations so long as they do not use the tainted evidence at trial, *i.e.*, so long as they use the tainted evidence "only" for such purposes as confrontation of a defendant at trial under the formula ("guise" is the better word) of "refreshing recollection" (as a preliminary to "rebuttal").

Once a decision such as that of the Court below in our case stands lodged on the books, *i.e.*, stands finally unreversed by this Court (as is the present posture of this

case in view of the denial of certiorari herein), what possible *Miranda* "deterrence" can further operate among our police and prosecutive establishments—on the one "deterrence" level that counts most, the day-to-day police-prosecutive functional level of custodial interrogation of persons suspected or accused of crime?

How can a prophylactic rule like the *Miranda* rule be enforced, how can one hope such a rule will get respectful obedience from policemen and prosecutors, on the stand-or-fall functional day-to-day "law enforcement" level throughout the innumerable police-prosecutive custodial enclaves of this country, when policemen and prosecutors are told by the Courts that, despite *Miranda*, there remains open to them a comfortably amorphous range of opportunity to exploit investigative or prosecutive advantage from *Miranda*-banned statements so long as the officers stop short of introducing such statements in evidence at the trial?

Short of such evidentiary use at trial, every policeman and prosecutive officer in the United States today stands assured—by the unreversed decision of the Court below in this case—that *Miranda*-tainted statements may be used as investigative "leads", and even as confrontational items in Court in the form of "exhibits for identification".

We repeat, not only does the unreversed decision of the Court below undermine *Miranda's* deterrence policy, but it affirmatively, irresistibly, tempts policemen and prosecutors to violate *Miranda*, deliberately, on the theory that they have nothing to lose and everything to gain in at least a substantial percentage of cases. This irresistible temptation will exist every time a policeman or prosecutor calculates that by *complying* with *Miranda* he will not get valuable admissible evidence anyhow (nothing to lose), and that by *violating Miranda* he will or may at least get "leads" and the right of "refreshing recollection" at trial (everything to gain).

The Court below itself acknowledged that "* * * we can certainly conceive of situations where the use of an improperly obtained statement, not itself admitted into evidence or read to the jury, would violate *Miranda* * * *" (Pet. Cert., App. 13a). However, the Court below went on to reason that error if any in this regard in the present case was harmless because Baratta's *Miranda*-banned admission that he had used the name Barrone was "merely cumulative to the massive documentary evidence on this point that was offered by the Government in rebuttal" (*ibid.*). And, it will be recalled, the Court below also held that this "massive documentary evidence" was constitutionally received in evidence at the trial because it was obtained in a search incident to a valid arrest which, though warrantless, was found by the Court below to have been "supported by an abundance of probable cause in the form of the information supplied by Bermudez and his fellow narcotic agents, and hence was lawful even without a warrant" (*id.*, 14a-15a).

Notwithstanding this reasoning of the Court below to the effect that any *Miranda* violation here was rendered insignificant by the products of the search which the Court found lawful, and notwithstanding that the Court below on this reasoning found it unnecessary to reach the *Walder* "collateral" impeachment issue in relation to *Miranda*, we herewith respectfully press our contention that *Miranda* overrides *Walder*, that this conclusion is now authoritatively supported by *Fox-Proctor-Groshart*, and that the primacy of *Miranda* over *Walder* justifies the granting of certiorari on our facts. Our reasons for pressing this position notwithstanding the conclusion of the Court below that the evidence obtained from the search deprives the *Miranda-Walder* issue of significance here, will be stated *infra*, after first noting the following additional facets of the issue of the so-called non-evidentiary use of the *Miranda*-banned statement for the ostensibly sole purpose of "refreshing recollection":—

The Court below said (Pet. Cert., App. 13a), "It is basic evidence law that a witness' recollection may be properly refreshed by writings and papers which are not in themselves admissible in evidence, *e.g.*, 3 *Wigmore on Evidence* §§758-765 (3d ed.) * * *". A reading of the cited sections of *Wigmore* reveals that the situation is considerably more complicated than one might infer from the easy phrase "basic evidence law" tossed off by the Court below in the portion of its opinion just quoted. For, in his §764 entitled "Cross-Examiner's Use of Writing To Revive Recollection", *Wigmore* lays down the positive, unequivocal requirement that when such "refreshing of recollection" process is enacted by a *cross-examining* party and the witness is forced by the Court to comply with the *cross-examiner's* requests, "* * * the paper so used must in fairness be *read aloud* or shown to the jury" (*Wigmore on Evidence* §764, 3d ed., vol. III, at p. 113—italics in original). But since in our case it is undisputed that the *Miranda*-banned statement used to "refresh recollection" could not be "read aloud or shown to the jury" precisely because it *was Miranda*-banned, then does it not follow that, under "basic evidence law", it was absolutely improper to resort at all to the device of "refreshing recollection" in this situation?

Furthermore, in the "Pocket Supplement" for *Wigmore's* §764 the author commences by adding a new paragraph to his first footnote for that §764, reading, "Distinguish the improper use of such memorandum for the purpose of impeachment under the pretext of refreshing the recollection of the witness", citing Federal and State authorities, including especially *United States* v. *Provoo,* 215 F. 2d 531 (C. A. 2, 1954) (disapproving use of army record to impeach testimony of defendant "under guise of 'refreshing his recollection' ").

Thus, the Court below in simplistically reasoning that "it is basic evidence law that a witness' recollection may

be properly refreshed by writings and papers which are not in themselves admissible in evidence", simply overlooked the whole cardinal distinction in this branch of the law of evidence as between witnesses on *direct examination* and witnesses on *cross-examination*. Baratta was being examined by the prosecutor on cross-examination when the *Miranda*-banned statement was used to "refresh his recollection". Can there be any doubt that this cross-examination of Baratta was an instance, as *Wigmore* has put it (*supra*), of "the improper use of such memorandum for the purpose of impeachment under the pretext of refreshing the recollection of the witness"? And, again, was it not a perversion of the whole "refreshment of recollection" theory to use that theory in the *cross-examination* setting where the indispensable concomitant of reading aloud or showing the statement to the jury was impossible as a matter of law?

When it is remembered, again, that the prosecutor's purpose in our case was to use the *Miranda*-banned statement as the opening wedge in an effort to justify "rebuttal" by resort to search-obtained evidence which the prosecution itself at that stage obviously deemed inadmissible except *via* the *Walder* "collateral impeachment" gimmick, the abuse of the supposed "basic evidence law" practice of "refreshing recollection" emerges the more offensively.

Here, then, is a perfect example of the newly portended general subversion of *Miranda* by giving police and prosecutors irresistible temptation to defy *Miranda* knowing that they have nothing to lose and something of real "value" to gain.

One other facet of the *Miranda-Walder* problem which deserves further comment here—before we take up the further questions as to the supposed effects of the search-obtained evidence in palliating the *Miranda* violation

herein—is the facet of just what is supposed to have been the *materiality* anyhow of Baratta's alleged use of the name "Barrone". It will be recalled that the Government wanted to use the *Miranda*-banned statement to "refresh the recollection" of Baratta regarding "Barrone". As we noted in our petition for certiorari (p. 36, fn.), the Government has been arguing that it desired this item to help it rebut Baratta's assertions of financial hardship, *i.e.*, Barattas' trial testimony that the reason he met with the narcotics seller Verzino was to borrow money not to help sell narcotics. In this Court the Solicitor General has apparently argued that this purpose of rebutting Baratta's claim of impoverishment was the Governments' sole purpose in using the *Miranda*-banned "Barrone" item (Mem. in Opp. p. 2). We have argued (Pet. Cert., *passim*) that the Government's real and obvious purpose was to depict Baratta as a guilt-conscious fugitive living under an alias, which the Government evidently could not prove by fair means and so tried to prove through the back-door methods of the *Miranda*-banned "Barrone" item and the derivatively "rebuttal"-introduced search items. We also noted in the petition for certiorari (p. 36, fn.) that the Court of Appeals has apparently not expressly approved the Government's suggestion that it was interested in disproving Baratta's poverty rather than in improperly insinuating fugitivity. We would therefore now re-emphasize that between the time of Baratta's incident of financial neediness at the meeting with Verzino (September 1963) and the time of the arrest and the *Miranda*-banned interrogation (July 1964), there was a lapse of nearly one year. This lengthy time lapse makes it very difficult to justify the *Miranda*-banned "Barrone" interrogation at trial based on the July 1964 statement as being "material" to the issue of "rebuttal" of Baratta's claim of having been impoverished nearly a full year earlier. In any event, *Fox-Proctor-Groshart, supra*, treat *Miranda* as dissolving all or any *Walder* distinctions between "collateral" and "direct" items, as we previously noted.

III. The cumulative effects of (1) the *Miranda* violation, (2) the Government's conduct in obscuring the date of the arrest and search which misled the defense and the District Court into thinking that there was a valid arrest warrant, and (3) the high-water-mark extremeness in the reach of the search power here exercised (search of a private home without either an arrest warrant or a search warrant).

Were it not for the prominent recent emergence of the *Miranda* protections as overriding the *Walder* case—as declared in the *Groshart, Proctor* and *Fox* decisions, *supra*—we would hardly have felt justified in invoking the re-hearing powers of this Court with reference to the search aspects of this case. But because the *Miranda* point seems to us so compelling under the latest Federal Circuit decisions including especially *Fox,* and because, if we may indulge in the Lutheran figure of speech, "we can do no other" than to try to keep nailing to the *certiorari* door-post of this Court our "thesis" that the overall conduct of the Government in this case has effected, albeit intricately, a subversion of the *Miranda* protections, we are obliged to say a few words in this petition for re-hearing concerning the search aspects as such, *i.e.,* as distinct from the *Miranda* aspects as such.

So far as we know, there is no decision of this Court which approves a search in a family's permanent private residence, where there was neither an arrest warrant nor a search warrant. We do not understand the seemingly axiomatic acceptance by the Court below of the idea that, without an arrest warrant and without a search warrant, police may search a man's private home so long as they have "probable cause" to arrest him on a charge of felony. Allowing the doctrine of arrest-incident search to operate in this unlimited way, where arrest moreover is without benefit of a warrant, is to cre-

ate a "very dangerous amalgamation of powers". (*Giles v. United States*, 284 Fed. 208, 214 (C. C. A. 1, 1922).

The Court below cited, as its sole authority for this arrest-search power, the case of *United States* v. *Hall*, 348 F. 2d 837, 841 (C. A. 2, 1965), *cert. denied* 382 U. S. 497. Supplementing our discussion of the *Hall* case in our petition for *certiorari* (p. 41), we would now note that the warrantless arrest in *Hall* was in an automobile on the highway, and the warrantless search was of the defendant's person and the automobile; there was no search of a private home. In fact, the *Hall* case apparently did not even involve a defense challenge to the physical search, but only to the taking of certain verbal statements after the arrest, the defense contending that the arrest warrant used was invalid (which the Government conceded), the Government justifying the arrest as based on reasonable cause to believe that Hall had committed a felony, and Hall conending that this is not enough when the Government had time to obtain a warrant and that the existence of such time was conclusively demonstrated by the Government's having done so. Thus, *Hall* affords no authority for the sweeping proposition that a warrantless search of a private home incident to a warrantless arrest is lawful upon the arresting officers' having probable cause to make the arrest without a warrant. Nor, again, do we know of any other decision—nor did the *Hall* decision cite any—in support of this strange claim of arrest-search power.

It should be noted that the Court below did not adduce—nor has the Government done so in this case—the no-warrant arrest authority of 26 U.S.C. §7607 which allows narcotics agents this power. It is not surprising that the latter statute has not been invoked in this case, when the text of the statute, and its legislative history are considered. The statute allows narcotics arrests without warrant "where the violation is committed in

the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation". The test of "reasonable grounds" under this statute is, of course, the same as that for "probable cause" under the Fourth Amendment. *Draper v. United States*, 358 U. S. 307, 310, fn. 1. This legislation, then, gives narcotics officers no greater arrest powers than the Fourth Amendment gives them; and, needless to say, it gives them no search powers except such as may tack onto a Fourth Amendment-permitted arrest.* There is no decision by this Court approving search of a private home as an incident to a warrantless arrest under §7607 (or under any comparable no-warrant legislation, such as 26 U.S.C. §7608).

As for the legislative history of §7607: The legislative history of the Narcotic Control Act of 1956 (26 U.S.C. §7607) confirms that Congress had no intention of creating a form of the arrest power that would mark any new extension whatsoever into the area protected by the Fourth Amendment. On the contrary, the legislators were told by the chief sponsor of the bill that narcotic agents were simply to be given powers of warrantless arrest equivalent to those already permitted to other federal officers.** Thus, in presenting the legislation on

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* The Fourth Amendment requirement of probable cause applies, of course, to both arrest and search warrants. *Giordenello v. United States*, 357 U. S. 480, 485-486.

** The Narcotic Act arrest provision in question is therefore to be deemed to have been modeled after statutes none of which import any power of arrest inconsistent with the "probable cause" requirement of the Fourth Amendment. Those statutes are 8 U.S.C §1357 (in connection with which see 8 U.S.C. §1324) (immigration and naturalization officers); 14 U.S.C. §89 (Coast Guard); 18 U.S.C. §3052 (F.B.I.) and §3053 (United States Marshals) (see also 18 U.S.C. §3054-§3056, inclusive); 26 U.S.C. §7608 (Internal Revenue Officers).

the floor of the Senate, Senator Daniel stated, concerning the new arrest provision, not only that "the purpose is to give these law enforcement officers status comparable to that now held by agents of the Federal Bureau of Investigation and other federal enforcement officers", but he also went much farther in reassuring the Senate by depicting the provision as one limited to a right to "make arrests without warrant for violations *committed in their presence*". 102 Congressional Record (84th Congress, 2nd Session) 7284.* Senator Daniel also obtained leave to read into the record a "Report of Inter-departmental Committee on Narcotics to the President (February 1, 1956)," which made it particularly explicit that the prime purpose of the sponsors of the proposed new arrest provision for narcotics cases was to enable the agents to deal effectively with those violations as to which emergency action is necessary: "Even the shortest delay incident to obtaining a warrant from a magistrate under the most favorable cir-

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* Senator Daniel was speaking of the bill S. 3760, whose section 1408 was in all substantial respects identical with the law as finally adopted. 102 Congressional Record, p. 7285. In connection with Senator Daniels' above noted over-simplified description of the proposed provision as one seemingly dealing only with violations committed in the presence of narcotic agents, see the inartistic language of a report by the Sub-committee on Improvements in the Federal Criminal Code of the Senate Judiciary Committee, which was read into the Congressional Record during the debate, and where the following peculiarly-phrased statement appears: "* * * when federal agents see the violation occur or have probable cause to believe that it is occurring, and in cases of consent searches, the agents should be permitted to make arrests without search [*sic*] warrants, * * *". 102 Congressional Record 9014, columns 1-2. Later in the debate, Senator Daniel again told the Senate that the purpose of the proposed new arrest provision was to allow narcotic agents "to proceed in the way that other law enforcement officers are now required to do". 102 Congressional Record 9016.

cumstances would be fatal to many narcotic cases. Much of the business is in neighborhoods where alarms are quickly spread; much of the activity of narcotic criminals is in the nighttime and on weekends, or at other times when a magistrate cannot be reached without delay." 102 Congressional Record 9017, at 9020.* The reports of the Senate and House Committees, and of the Conference Committee, shed no further significant light on the legislative intent, with the single exception of House Report No. 2388 which echoed the idea that the proposed new arrest (and search) provisions were needed to deal with emergency situations: "* * * the enforcement officers have been required to secure an arrest warrant even though circumstances indicate the impracticability of such a procedure. The delay involved in obtaining the warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. * * *" House Report No. 2388, 84th Congress 2d Session, printed in U. S. Code Congressional and Administrative News (84th Congress 2d Session, 1956) pp. 3274 at 3283.

The foregoing is believed to be all of the legislative history material that is of pertinence for present purposes.

Both the text and the legislative history of 26 U.S.C. §7607, then, and the few pertinent judicial expressions which have appeared on the subject, point inescapably to the conclusion that this provision for narcotic arrests without a warrant was never intended to place in the hands of the narcotic agents an untrammeled discretion-

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* While the statement above last quoted may ambiguously have referred to both search warrants and arrest warrants, the distinction was not made clear in the text of the quoted report. The fact remains that the legislators were being told that the proposed new powers were needed for emergency cases.

ary authority to utilize such arrest powers indiscriminately in any case where probable cause exists to believe that an offense has been committed, irrespective of its remoteness in time, or irrespective of all other surrounding circumstances of the case which would favor applying for a warrant. The legislative intent could scarcely be more explicit that the new power was being given to narcotic agents in order to meet the practical necessities of those cases where the obtaining of an arrest warrant might not be readily feasible or safe and the quarry might escape apprehension in the meantime.

It would, therefore, appear that the mere existence of 26 U.S.C. §7607—or of any comparable supposed general no-warrant "probable cause" power— cannot exert one iota of legal force to validate an arrest and an arrest-incident search of a private home which would be violative of the Fourth Amendment. The Fourth Amendment does not countenance the fearsome "amalgamation of powers" that is portended by the use in this case of a power of warrantless search of a private dwelling incident to a warrantless arrest.

Even though neither the Government nor the Courts below have referred to the no-warrant narcotics arrest legislation (26 U.S.C. §7607), we have above devoted some discussion to that legislation because of the analogy which that legislation affords to the strange, generalized power of warrantless arrest plus incident private-home search which the Government and the Court below assert in this case. The narcotics arrest legislation (§7607) may be taken as a specific instance of the kind of warrantless arrest power (for probable cause) relied on by the Government and the Court below in this case; but those assertions here include also a power of warrantless search in private dwellings. Neither judicial precedent in this Court, nor the legislative history, with respect to §7607, give any support to those

assertions. Nor, again, do we know of any other legal support for those general assertions, except the decision of the Court below and its inapt citation of *United States* v. *Hall, supra.*

When this Court in *Draper* v. *United States,* 358 U. S. 307, approved a narcotics arrest and search under §7607, without any warrant, the facts did not involve search of a private home, but instead search of the immediate person of the party who was arrested without a warrant. To our knowledge, no other decision of this Court has gone farther than *Draper* in allowing amalgamation of the warrantless arrest-search power.

We therefore respectfully urge that, especially in the light of the cumulative constitutional effects here involved in regard to the inter-connections between the *Miranda-Walder* issues of this case and its Fourth Amendment issues, the Fourth Amendment issues as such are deserving of re-hearing—and we again respectfully re-emphasize that the sharpening of constitutional focus on our within *Miranda-Walder* issues, a sharpening which has come about through the Circuit decisions in *Fox-Proctor-Groshart,* additionally favors re-examination of the Fourth Amendment issues herein.

CONCLUSION

It is respectfully prayed that this petition for re-hearing of the denial of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER
HERMAN EDELMAN

Attorneys for Petitioner
Anthony Baratta

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

ABRAHAM GLASSER
Attorney for Petitioner
Anthony Baratta

December 6, 1968.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 542—September Term, 1967.

(Argued June 21, 1968. Decided October 18, 1968.)

Docket No. 32037

UNITED STATES OF AMERICA,

Appellee,

—v.—

JACK SOLOMON FOX and SAMUEL NORBER,

Defendants-Appellants.

Before:

MOORE and FRIENDLY, *Circuit Judges,* and
BRYAN, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Tyler, *J.*, entered on a jury verdict convicting the two appellants of violating 18 U. S. C. §659 and of conspiring to violate 18 U. S. C. §2314. Reversed for a new trial.

* Of the Southern District of New York, sitting by designation.

FREDERICK F. GREENMAN, JR., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Pierre N. Leval, Assistant United States Attorney, on the brief), *for Appellee.*

JOSHUA N. KOPLOVITZ, Esq., New York, N. Y. (Daniel H. Greenberg, Esq., New York, N. Y., on the brief), *for Appellants.*

BRYAN, *District Judge*:

After trial before Judge Tyler and a jury appellants were each convicted on two counts: first, of knowing possession of 77 cartons of drugs of the value of over $100 stolen from an interstate shipment (18 U. S. C. §659), and second, of conspiring to receive and transport in interstate commerce stolen goods of a value exceeding $5,000 (18 U. S. C. §2314). They appeal from the judgments of conviction.

The principal contention on this appeal is that a pre-arraignment statement given by appellant Fox to F. B. I. agents should not have been admitted in evidence. It is urged that the warnings given to Fox were inadequate under the standards set in *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

The jury was entitled to find the following facts:

On December 20, 1963 a truck containing some $200,000 of Squibb drugs moving in interstate commerce was hijacked in New York City. In late December or early January 1964 the stolen drugs were stored by Paul DeVito and Anthony Rinaldi in the basement of an empty drug store in Rocky Point, Long Island.

In February, 1964, appellants Fox and Norber jointly borrowed $5,000 from a Detroit bank, ostensibly in order to buy for quick re-sale some distress merchandise then available at bargain prices. The money was placed in Norber's account. On March 3, 1964, Fox and Norber drove to New York in Fox's Ford Econoline truck and checked into a double room at the Travel Lodge Motel in mid-Manhattan.

On March 5 Fox drove his truck to the empty drug store in Rocky Point, Long Island, and a portion of the stolen drugs in the basement was loaded into the truck. Fox then drove the truck back to the Manhattan motel. On March 6 DeVito called Fox and Norber in their motel room, asking to speak to "Fox or Sam."

On March 7 Fox and Norber checked out of the motel and drove in Fox's truck toward the Lincoln Tunnel. As they were about to enter the tunnel they were arrested by F. B. I. agents. In the truck were 77 cartons of the stolen drugs worth approximately $14,000. On the top of the cartons was a blue plastic bag containing several Squibb drug price lists, a handwritten inventory of the cartons in the truck, and 11 Squibb invoices showing the prices of several of the items found in the truck. When Fox and Norber were searched, Fox had a slip of paper on which he had written directions to the Rocky Point drug store.

At the end of the Government's case Norber rested. Appellant Fox took the stand. He testified in substance that he was in the barber and beauty supply business in Detroit; that he and Norber had borrowed the $5,000 for the purpose of picking up some merchandise at a close-out; that he had come to New York (where he met Norber by pre-arrangement) to pick up an order of beauty and barber supplies which he collected only after he was arrested and released; that on the night of March 3 and the morning

of March 4 he had conferred with a William Marcus, a Detroit drug wholesaler, who introduced him to a man known as "George"; that on March 4 Fox and George had driven to the Rocky Point drugstore, loaded some drugs and returned to the motel; that on the night of March 4 Fox had stomach cramps and gave the key to his truck to Marcus who took it and returned the truck to Fox that evening emptied of its contents; that the next morning Fox again went to Rocky Point where he met George and gave him a slip of paper from Marcus; that George loaded the truck with cartons and both drove back to the motel and that Fox and Norber were arrested on March 7 with the second load of drugs as they were starting out for Detroit. Fox said he believed the drugs to have been close-out merchandise which had been obtained by Marcus and testified that he did not know that they were stolen.

On cross-examination Fox denied telling the arresting agents that he had been at Rocky Point looking for a race-track on March 4; that they had asked him any questions about the contents of the truck or that he had told them that he didn't know what the contents were; or, in fact, that he had told them anything.

On rebuttal the Government called McGillicuddy, an F. B. I. Agent, who had been present at the arrest and interrogation of Fox on March 7th. McGillicuddy testified that after the arrest he and agents McGoey and Saunders took Fox to the F. B. I. office in Manhattan, and that, "Agent McGoey advised Fox that he didn't have to make any statement; that any statement that he made could be used in a court of law and he could consult an attorney prior to any question," and that the defendant indicated that he understood the advice given him.

According to McGillicuddy, Fox, after being so advised, was asked about the contents of the truck. Fox said that

the truck contained approximately 70 cartons of merchandise and that he was not aware of what the merchandise was; that he didn't know the individuals from whom he had purchased the goods; that when he was asked why he had been in the Rocky Point Area of Long Island on March 4th, he said that he had gone to the Island on the 4th looking for a racetrack; that he hadn't found a racetrack on that day and that he didn't know anybody at Rocky Point.

The appellants challenge the admissibility of the McGillicuddy testimony as to the Fox statements, primarily on the ground that the warnings given to Fox did not satisfy minimal *Miranda* standards.

The Government counters with the claims (1) that no proper objection on *Miranda* grounds was made at the trial to the admission of this evidence, and (2) that even had proper objection been made, Fox's statements would still have been admissible since "their sole effect was to impeach his credibility on a collateral matter—his trip to Rocky Point and his dealings with Marcus and the mysterious 'George.'" The Government also suggests that "no desirable purpose would be served in extending the prophylactic rules of *Miranda* to exclude the statements at issue here, especially where the warning given was a fair one which fully complied with the law before *Miranda*."

In *Miranda* v. *Arizona*, the Supreme Court held that

> "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the

exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U. S. at 478-479.

Although the interrogation of Fox occurred before the decision in *Miranda*, the trial commenced after the decision and the *Miranda* standards govern, *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), unless, as the Government argues, they do not apply to the facts here.

We agree with appellants that the warnings given in the case at bar did not comply with *Miranda* standards.

(1) *Miranda* requires that the accused be told that he has "the right to remain silent." Fox was merely told "he didn't have to make any statement." This is by no means the same thing. It could easily be interpreted to mean that Fox did not have to make a formal statement rather than that he need not answer any questions or say anything at all.

(2) *Miranda* requires that the accused be told that "he has the right to the presence of an attorney," plainly meaning to have an attorney present at the interrogation. Fox was told "he could consult an attorney prior to any question." There was no indication given to him that he had the right to have an attorney present during the interrogation.

(3) Nothing at all was said to Fox about his right to have an attorney appointed prior to questioning if he could not afford one, as *Miranda* requires.

Although the "words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective" and "words which convey the substance of the warning along with the required information are sufficient," *United States* v. *Vanterpool*, —— F. 2d —— (2d Cir., Apr. 29, 1968), the warnings in the case at bar taken as a whole do not convey the substance of the *Miranda* requirements and do not comply with them.[1]

The Government argues that, even if the rebuttal testimony as to Fox's statement was inadmissible under *Miranda* standards, the objections made by defense counsel at the trial were insufficient to preserve the *Miranda* issues on appeal, citing *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

We think that the objections made at trial were sufficient. Both in the robing room and in open court defense counsel directed objections specifically at the rebuttal testimony as to Fox's statements to the agents.

His first objection in the robing room was based on *Mallory* v. *United States*, 354 U. S. 449 (1957). However, when he renewed his objection in open court he called for a voir dire on the "voluntariness" of any post-arrest statements made by Fox. The trial judge denied the voir dire request but gave him a continuing objection to the McGillicuddy testimony.

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1 In *United States* v. *Vanterpool*, *supra*, and *United States* v. *Anderson*, —— F. 2d —— (2d Cir., May 8, 1968), as in the instant case, the warnings were given prior to the decision in *Miranda*. However, the warnings upheld in those cases went much further toward complying with the substance of *Miranda* than those given Fox. In both *Vanterpool* and *Anderson* the defendant was told that he had a right to remain silent. Moreover, in both cases some mention was made of the right to appointed counsel. Finally, the defendant in *Vanterpool* was told that he had "a right to an attorney and to consult with a lawyer at this time," and in *Anderson* that "he had a right to a lawyer at this time."

Defense counsel's objection as to "voluntariness" was made after McGillicuddy had testified as to the warnings given but before he was allowed to answer any questions as to Fox's statements. Thus, the timing of the objection highlighted its substance. The reliance on "voluntariness" was quite adequate to preserve a *Miranda* objection. Voluntariness is scarcely a limiting term of art which excludes self-incrimination or violation of the *Miranda* rules.[2]

No doubt the repeated objections could have been more accurately phrased. But the refusal of a voir dire tended to foreclose clarification. It would be hypertechnical to call the objections insufficient to preserve such a basic claim as this on appeal. Nor do we feel that *United States* v. *Indiviglio, supra,* which is markedly distinguishable on its facts, can or should be extended to cover the situation here.

The Government urges, however, that in any event the McGillicuddy testimony as to Fox's statement was admissible in rebuttal under the circumstances of this case. It characterizes the statement as exculpatory rather than inculpatory and says that its sole effect was to impeach Fox's credibility on matters collateral to the Government's case in chief and not to challenge directly defendant's innocence. The Government contends that the statement was therefore admissible under the pre-*Miranda* decisions in *Walder* v. *United States,* 347 U. S. 62 (1954), and *United States* v. *Curry,* 358 F. 2d 904, 907-913 (2d Cir.), cert. denied, 385 U. S. 873 (1966), rehearing denied, 387 U. S. 949 (1967), and that the authority of these cases has not been undercut by *Miranda.*

In *Walder,* a 1950 indictment against defendant for the purchase and possession of heroin had been dismissed on

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2 This theme runs through the decision in *Miranda.* See, e.g., 384 U. S. at 457, 461-462, 465, 467-470, 478. See also *Wheeler* v. *United States,* 382 F. 2d 998, 1001 (10th Cir. 1967).

the ground that the heroin capsule had been obtained by a search and seizure illegal under the Fourth Amendment. Defendant was again indicted two years later for other quite separate illegal transactions in narcotics. He took the stand and testified that he had never possessed any narcotics. The Government was then permitted, over objection, to introduce evidence of defendant's earlier possession solely for purposes of impeachment.

In sustaining the trial court's ruling the Supreme Court said,

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.
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> "• • • Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U. S. at 65.

The *Walder* holding was extended by this circuit in *United States* v. *Curry, supra,* to permit the use of state-

ments illegally obtained from a defendant to impeach his credibility on collateral matters not bearing directly on the question of guilt or innocence or contradictory of his version of the facts constituting the crime charged.[3]

These were pre-*Miranda* cases. In *Miranda* the Supreme Court said in unequivocal language:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any statement made by a defendant.* No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, *no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'* If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. *In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.* These statements are incriminating in any meaningful sense of the word and

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3 In other jurisdictions the *Walder* doctrine also was applied to statements illegally obtained from the defendant. See, e.g., *Tate* v. *United States*, 288 F. 2d 877 (D. C. Cir. 1960). The *Tate* decision was limited somewhat by later cases in the District of Columbia Circuit. See, e.g., *Inge* v. *United States*, 356 F. 2d 345 (D. C. Cir. 1965); *Johnson* v. *United States*, 344 F. 2d 163 (D. C. Cir. 1964). See generally, "The Impeachment Exception to the Exclusionary Rules," 34 U. Chi. L. Rev. 939 (1967).

may not be used without the full warnings and effective waiver required for any other statement." 384 U. S. at 477-478 (emphasis supplied).

Moreover, the Court went on to state that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation can be used against him*" (*id.* at 479) (emphasis supplied).

These pronouncements by the Supreme Court may be technically dictum. But it is abundantly plain that the court intended to lay down a firm general rule with respect to the use of statements unconstitutionally obtained from a defendant in violation of *Miranda* standards. The rule prohibits the use of such statements whether inculpatory or exculpatory, whether bearing directly on guilt or on collateral matters only, and whether used on direct examination or for impeachment.

Thus, we conclude that insofar as *Curry* and similar pre-*Miranda* cases extended the *Walder* doctrine to permit the use of statements unconstitutionally obtained from a defendant for purposes of impeachment on collateral matters, they are no longer governing law.[4]

Walder, involving as it does, the use for impeachment purposes of tangible evidence obtained by illegal search and seizure in connection with a charge entirely different

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4 Quite a different question was presented in *United States* v. *Armetta*, 378 F. 2d 658 (2d Cir. 1967) "where defendant's testimony [put] in issue the very question of what he told the police." 378 F. 2d at 662. In *Armetta* the court was necessarily faced with determining only whether the admission of the statement given to the police was "plain error" under Rule 52(b), F. R. Cr. P. But as Judge Waterman's concurring opinion in *United States* v. *Vanterpool*, *supra*, pointed out, it is difficult to see how the statement in *Armetta* could be ruled inadmissible even had timely objection been made "when the fact that there was an interrogation is first injected into the trial by the defendant himself."

from that on trial, is plainly distinguishable from the case at bar on its facts. We express no view on the continued viability of *Walder* on its facts,[5] but we are clear that in the light of *Miranda* it is no longer controlling in cases like that at bar.[6]

Since adequate *Miranda* warnings were not given in the case at bar, the Fox statements were inadmissible whether or not they related solely to collateral or direct issues. *Groshart* v. *United States*, 392 F. 2d 172 (9th Cir. 1968), reached the same conclusion as we do here. In so doing it pointed out that "the distinctions between direct and collateral issues, between major and minor points, or between lawful and unlawful acts are essentially meaningless. We reject them because they are * * * 'virtually unworkable.'" 392 F. 2d at 179 (citations omitted). The difficulties and complications of applying such distinctions are well pointed out in the excellent discussion in *Groshart*. See *id.*, at 179-180. See also *Wheeler* v. *United States*, 382 F. 2d 998 (10th Cir. 1967); *Commonwealth* v. *Padgett*, 428 Pa. 229, 237 A. 2d 209 (1968); *State* v. *Brewton*, —— Ore. ——, 422 P. 2d 581, cert. denied, 387 U. S. 943 (1967); *People* v. *Kulis*, 18 N. Y. 2d 318, 323-324, 274 N. Y. S. 2d 873, 875-876, 221 N. E. 2d 541, 542-543 (1966) (dissenting opinion of Keating, *J.*).

The case at bar is illustrative of these difficulties. For example, it would be hard to say that the issue as to whether Fox was present in Rocky Point where the goods

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5 But see *United States* v. *Birrell*, 276 F. Supp. 798, 817 (S. D. N. Y. 1967).

6 We do not deal at this juncture with the admissibility for impeachment purposes of statements not qualifying under *Miranda* where, as in *Walder*, a defendant at trial, "Of his own accord * * * [goes] * * * beyond a mere denial of complicity in the crimes of which he is charged and makes the sweeping claim that he has never" engaged in criminal activity similar to that charged. 347 U. S. at 65.

apparently came into his possession is collateral rather than bearing directly on innocence or guilt. It is an event which is closely related to the issues which the Government tendered to prove the commission of the crimes charged—knowing possession of goods stolen from an interstate shipment and conspiring to receive and transporting stolen goods in interstate commerce. Moreover, the principal issue at trial was Fox's guilty knowledge, and the jury was charged in that connection that false exculpatory statements could be considered as evidence of guilty knowledge.

The difficulties and complications of the *Curry* formulation are eliminated by following the clear mandate laid down in *Miranda*. Thus the conviction of Fox must be reversed on the ground that the required *Miranda* warnings were not given and that the testimony by McGillicuddy as to his statements made in the absence of such warnings was inadmissible.

Reversal as to Fox also requires reversal as to Norber. The theory of the Government's case was that Fox and Norber were partners in the criminal conduct charged and the acts proved in furtherance of the partnership were principally those of Fox. It would be difficult to say that any major discrediting of Fox who was the only defendant to take the stand did not spill over on Norber or that the jury would have found Norber guilty if they had exonerated Fox.

Finally, we are well aware that the new Crime Control Act became law on June 19, 1968. On a retrial, if Fox again takes the stand and the Government offers rebuttal testimony as to his post-arrest statements, issues may arise as to the applicability and constitutionality of 18 U. S. C. §351 added by Title II of the Act, and as to the

procedures to be followed thereunder.[7] It would be premature for us to attempt to deal with such issues now when it cannot be foreseen how the new trial will develop or, indeed, whether such issues will arise at all.

In view of the grounds upon which we have reversed, it is unnecessary to reach the other questions raised by the appellants, except to say, in the interest of avoiding error at the retrial, that we seriously doubt the correctness of the judge's excluding testimony by Fox as to conversations with Marcus as hearsay. See *United States* v. *Costello,* 352 F. 2d 848, 853-54 (2d Cir. 1965), cert. granted on other grounds, 383 U. S. 942 (1966), mooted by Costello's death, see *Marchetti* v. *United States,* 390 U. S. 39, 41 n. 1 (1968).

The judgments of conviction are reversed and a new trial ordered.

MOORE, *Circuit Judge* (dissenting):

I dissent.

If our opinion of some three months' standing that "the words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective," and that "Words which convey the substance of the warning along with the required information are sufficient" [1] is to have any application to subsequent decisions in this circuit on the point involved, this case calls for such application. There was nothing said in *Miranda* itself that there must be slavish adherence *in haec verba* to the for-

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7 It may be noted that under the new Act, after a trial judge determines that a statement was voluntarily made, he "shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all of the circumstances."

1 *United States* v. *Vanterpool,* 394 F. 2d 697 (2 Cir. April 29, 1968).

mula suggested therein. The Supreme Court believed that "in-custody" questioning jeopardized the privilege against self-incrimination. The Court stated that "Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required." Then follows the formula which the majority holds, in effect, must be stated literally and without variation.

The majority, in holding that the words "he didn't have to make any statement" did not sufficiently warn of Fox's "right to remain silent," have to resort to the farfetched supposition that "statement" "could easily be interpreted to mean that Fox did not have to make a *formal* statement rather than that he need not answer any questions or say anything at all." (Emphasis mine.)

I cannot conceive that anyone, just having been arrested, when told that he didn't have to make a statement would construe this warning as relieving him of an obligation to make a formal statement akin to a press release. Such a construction, in my opinion, is highly unrealistic. To give such talismanic significance to the words "the right to remain silent" is to preclude all other forms of expression which would convey the same idea. In *Miranda*, the Supreme Court clearly did not wish to prescribe such a strict formula. At page 484, the Court cited a letter from the Solicitor General which was "consistent with the procedure we delineate today" in which the Solicitor General advised the Court that the FBI warned suspects that they had "a right to say nothing," citing as examples, *Westover* v. *United States*, 342 F. 2d 684 (9 Cir. 1965), rev'd on other grounds, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and

Jackson v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964), *cert. denied*, 380 U. S. 935 (1965). In both those cases, the language used was that the suspect "did not have to make a statement."

The second deviation found by the majority from their conception of *Miranda* standards is that Fox was only told that "he could consult an attorney prior to any question," whereas he should have been told that he had "the right to the presence of an attorney." But if he had the right to consult an attorney "prior to *any* question" (emphasis added), the attorney could have prevented any interrogation without his being present—or any interrogation at all.

As a third deficiency, the majority point to the failure to offer the appointment of counsel on the assumption that Fox could not afford one. Of course, if Fox had even suggested indigency, he would have been entitled to counsel; but absent some expression of financial inability or any showing of actual harm based on indigence, his rights were not jeopardized. Admittedly, in *Miranda*, at 473, n. 43, the Supreme Court advised against *ex post facto* inquiries into actual harm premised on financial inability; the Court's rationale was that the expedient of giving a warning, as outlined in *Miranda*, was "too simple." Here, however, the interrogation occurred before both the Criminal Justice Act of 1964, 18 U. S. C. A. §3006A and *Miranda*. The agents were not forewarned of what was later to be found a simple "expedient." Therefore, in these circumstances, inquiries into actual prejudice should be permissible. In this case, there is no proof of any harm premised on financial inability. Moreover, Fox was apparently fully aware of his rights. Several minutes after the interview began, he stated that he would proceed no further without consulting an attorney.

In view of my belief that the *Miranda* warnings were adequate, I find it unnecessary to express my opinion as to the effect of the *Walder* or *Curry* decisions on cases involving similar facts or principles. However, if the true administration of justice is related in any way to the development of the truth under the particular circumstances presented to the courts in these two cases, I would endorse the portion of Judge Waterman's concurring opinion in *Vanterpool, supra* at 701. "The defendant by his own testimony voluntarily and intentionally relinquished his right to have what he said at the interrogation remain hidden from the jury and the trial judge."